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THE PRINCIPLES

OF THE

AMERICAN

LAW OF BAILMENTS

A Companion to the Author's Work on Contracts.

BY

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TABLE OF CONTENTS.

CHAPTER I.

PRELIMINARY.

SECTION 1. The History of Bailment Law.
2. The English Writers.
3. The American Writers.
4. Plan and Arrangement of this Work.

CHAPTER II.

THE TWO GREAT DIVISIONS.

SECTION 5. What a Bailment is.
6. The Classes of Bailments.

DIVISION I.

THE ORDINARY BAILMENT.

CHAPTER III.

THE GENERAL PRINCIPLES.

SECTION 7. Subject Matter of Bailment a Chattel.
8. The Test of a Bailment.
9. The Parties to a Bailment.
10. Consideration in Bailments.
11. The Care and Diligence Required of Bailees.
12. Negligence Defined and Illustrated.
13. Modification of Liability by Agreement.
14. Modification of Liability by Acts or Conduct of Bailor.
15. The Bailee's Special Property in the Chattel.
16. Negligence Immaterial in Certain Cases.
17. Bailee's Property Limited to the Trust.

SECTION 18. The Trust Duties of the Bailee.
19. (a) To Hold of the Bailor.
20. (b) To Follow His Instructions.
21. (c) To Follow the Contract.
22. (d) To Re-deliver the Thing.
23. Excuses for Non-Delivery.
24. The Duties of the Bailor.
25. Compensation and Reimbursement.
26. The Lien Upon a Chattel for Services.
27. The Bailee's Lien Generally.
28. Joint Bailors and Bailees.
29. The Termination of the Bailment.

CHAPTER IV.

THE BAILMENT FOR THE BAILOR'S BENEFIT.

SECTION 30. The Deposit and Mandate.
31. Consideration Must be Absolutely Absent.
32. Any Indirect Benefit Sufficient.
33. Liability of Gratuitous Bailees.
34. Effect of Bailee's Previous Request.
35. Skilled Bailees.

CHAPTER V.

THE BAILMENT FOR THE BAILEE'S BENEFIT.

SECTION 36. The Gratuitous Loan.
37. Benefit Must be all on Borrower's Side.
38. Liability of Borrower.

CHAPTER VI.

THE MUTUAL BENEFIT BAILMENT.

SECTION 39. The Classes of Mutual Benefit Bailments.
40. The Standard of Care and Responsibility.

(a) Hire of Things.

SECTION 41. The Hire of the Use of a Thing.
42. The Hirer's General Responsibility.

(b) Hire of Labor and Services.

43. The Workman, Manufacturer, Laborer or Artizan.

(c) Hire of Care or Custody.

44. The General Principle.
45. The Agister.
46. The Liveryman.
47. The Warehouseman.
48. The Wharfinger.

(d) Hire of Carriage.

49. The Private Carrier.

CHAPTER VII.

THE MUTUAL BENEFIT BAILMENT (CONTINUED) THE PLEDGE.

SECTION 50. Pledge Defined.
51. Distinction between Pledge and Chattel Mortgage.
52. What may be Pledged.
53. The Pledged Thing.
54. The Pledgor's Title.
55. The Debt or Engagement.
56. The Increase and Profits.
57. The Pledgee's Right of Transfer.
58. The Pledgee's Duties in Regard to the Pledge.
59. The Pledge an Additional Remedy.
60. The Right to Redeem.
61. The Pledgee's Duty to Re-deliver.
62. The Pledgee's Right to Sell on Default.
63. Pledgee Cannot Purchase.
64. Irregular Sale may be Ratified.
65. Power to Sell not Mandatary.
66. Pledgee not Liable for Consequences of Sale, When.
67. The Pledgor's Right to the Surplus.
68. The Pledgee's Right of Action.
69. The Pledgor's Right of Action.
70. The Pledge, How Extinguished.
71. Effect of Death of Either Party.

DIVISION II.

THE EXCEPTIONAL BAILMENT.

PART I.

THE INNKEEPER.

CHAPTER VIII.

INNKEEPERS.

SECTION 72. Who are Innkeepers.
73. Duty to Receive the Public.
74. Duty only Toward Guests.
75. Duty as to Guest's Person.
76. An Insurer of Guest's Property.
77. At what Time Liability Begins.
78. At what Time Liability Ends.
79. For what Property Responsible.
80. Contributory Negligence of Guest.
81. Limitation of Innkeeper's Liability.
82. The Innkeeper's Lien.

PART II.

THE COMMON CARRIER OF GOODS.

CHAPTER IX.

INTRODUCTORY.

SECTION 83. Who are Common Carriers.
84. The Different Classes of Common Carriers.
85. Who are not Common Carriers.
86. Carriers of Live Animals.
87. Divisions of the Subjects.

CHAPTER X.

THE DUTY TO RECEIVE.

SECTION 88. Common Carrier Subject to Legislative Control and Regulation.
89. Must Carry for all Persons.
90. Must Carry for Reasonable Compensation.
91. Must Carry for all under same Conditions.
92. Discrimination in Charges.
93. Exceptions to Rule that Common Carrier must Carry for all.
94. Where Payment of Charges Refused.
95. Where Service Demanded Outside his Profession.
96. Where Goods Illconditioned or Suspicious.
97. Where he has Insufficient Room.
98. Carriage must be for Hire.
99. Carriage beyond Carrier's Route.
100. Carrier's Power to Carry Beyond his Route.
101. Not Bound to do so.
102. Effect of Agreement Not to Carry Beyond Route.
103. Proof of Agreement to Carry Beyond Route.
104. Actual Delivery to Connecting Carrier Required.
105. Aliter as Between the Carriers Themselves.
106. Receipt of Goods marked to Place Beyond Route.—The English Rule.
107. The American Rule.
108. Right of Connecting Carrier to Exemptions in First Contract.
109. Power of First Carrier to Contract with Connecting Carrier.
110. Other Rights and Liabilities of Connecting Carriers.
111. Presumption as to Time of Damage.

CHAPTER XI.

THE RESPONSIBILITY DURING TRANSIT.

SECTION 112. Carrier's Responsibility Begins on Delivery.
113. Actual or Constructive Acceptance Necessary.
114. At What Place Must Delivery be Made.
115. To Whom Must Delivery be Made.
116. Delivery According to Usage and Custom.
117. Common Carrier a Bailee for Hire.

SECTION 118. Common Carrier Likewise an Insurer.
119. Exception to his Liability as Insurer.
120. The "Act of God."
121. Discordant Decisions.
122. Cases not Within the "Act of God."
123. The Question of Negligence Immaterial.
124. "Act of God" Must be Exclusive Cause.
125. Negligence and "Act of God" Concurring.
126. Loss by "Act of God" after Delay.
127. Loss by "Act of God" after Deviation.
128. Duty of Carrier to Preserve Goods Damaged by "Act of God."
129. The Public Enemy.
130. Losses Caused by Inherent Defects in Goods Carried.
131. Losses Caused by Seizure under Process.
132. Losses Caused by Act or Omission of Owner.
133. Losses Caused through Fraud of Owner.
134. Losses Caused by Neglect of Owner.
135. Owner Undertaking Part of Carrier's Duties.

CHAPTER XII.

MODIFICATION OF LIABILITY BY AGREEMENT.

SECTION 136. Power of Common Carrier to Limit his Liability.—In England.
137. In the United States.
138. Reasons for the American Rule.
139. Anomalous Doctrines in New York, Illinois and Pennsylvania.
140. Notices Limiting the Carrier's Liability.
141. Distinctions Between Notices Limiting Liability and Notices of Reasonable Regulations.
142. Notices as to Value and Character of Goods.
143. Methods of Giving Notice.—Advertisements and Placards.
144. Notices in Receipts or other Vouchers.
145. Notice Assented to Constitutes a Contract.
146. Assent not Inferred from Mere Knowledge.
147. Accepting Papers Containing Limitations or Conditions.
148. Bills of Lading.
149. Express Receipts.

SECTION 150. Baggage Checks.
151. Requisites to Validity of such Notices.
152. There Must be no Mistake.
153. Nor Duress.
154. Nor Fraud.
155. Nor Waiver.
156. Nor Antecedent Parol Contract.
157. Must have a Consideration.
158. Time and Manner of Making Claim.
159. Other Conditions.
160. Bills of Lading as Receipts and Contracts.
161. Effect of the Special Contract.
162. Contracts Construed Strictly Against Carrier.

Conditions and Exceptions Peculiar to Carriage by Water.

163. Call at Ports.
164. Damage.
165. Dangers of the Roads.
166. Dangers of the Seas and Perils of Navigation.
167. Deficiency in Quantity.
168. Extraordinary Marine Risk.
169. Fire.
170. Good Order and Condition.
171. Invoice Value.
172. Leakage and Breakage.
173. On Lakes and Rivers.
174. Pilot, Master or Mariners.
175. Port of Discharge.
176. Privilege of Re-shipping.
177. Quantity Guaranteed.
178. Ready to Discharge.
179. Restraints of Princes.
180. Robbers and Thieves.
181. Tow and Assist Vessels.
182. Value and Contents Unknown.

Conditions and Exceptions Peculiar to Carriage by Land.

183. All Rail.
184. Article.
185. C. O. D.
186. Depot.
187. Feed, Water and take Proper Care.
188. Fire.
189. Household Goods.
190. Load and Unload.

SECTION 191. Loss.
192. On the Train.
193. Package or Thing.
194. Perishable Property.
195. Place of Destination.
196. Through Without Transfer.
197. Transit.
198. Unavoidable or Inevitable Accident.
199. Value or Cost.

CHAPTER XIII.

THE DUTY TO RE-DELIVER.

SECTION 200. Introductory.
201. Delivery at Proper Place.
202. Delivery in Reasonable Manner.
203. Delivery at Proper Time.
204. Delivery Within Reasonable Time.
205. Delivery under Special Contract — Instructions of Shipper.
206. Delivery to Wrong Person.
207. Duty of Carrier to Notify Consignor.
208. Right to Examine Goods.
209. Claims of Ownership by Third Parties.
210. Stoppage in Transitu.
211. Who may Sue for Loss or Injury to Goods.
212. Actions for Injury to or Interference with Goods.
213. Actions for Freight Charges.
214. Power to Sell.
215. The Carrier's Lien.

PART III.

THE COMMON CARRIER OF PASSENGERS.

CHAPTER XIV.

THE RELATION OF CARRIER AND PASSENGER.

SECTION 217. Who are Common Carriers of Passengers.
218. Must Carry for all.—Exceptions.
219. Where Payment of Fare Refused.
220. Where Service Demanded Outside his Holding out.

SECTION 221. Where He has Insufficient Room.
222. Where Person has Conflicting Interests.
223. Where Person Dangerous or Offensive.
224. Waiver by Receiving.
225. Who are Passengers.
226. Servants of Carrier as Passengers.
227. At what Time Relation Begins.
228. During what Time Relation Continues.
229. At what Time Relation Ends.
230. Persons not Passengers to whom Carrier Owes Duty.

CHAPTER XV.

THE DUTY AS TO MEANS OF TRANSPORTATION.

SECTION 231. Carrier of Passengers not an Insurer.
232. Duty as to Vehicles and Appliances for Transportation.
233. Duty as to Roadway.
234. Duty as to Receiving and Landing Places.
235. Duty to Adopt new Inventions for Safety.
236. Responsibility for Negligence of Manufacturer or Contractor.

CHAPTER XVI.

THE CONTRACT OF CARRIAGE.

SECTION 237. Time Tables as General Offers.
238. Offer Turned into Contract by Purchase of Ticket.
239. Liability for not Running according to Time Table.
240. Tickets as Contracts.
241. Ticket good for Continuous Trip.
242. Limitations as to Time.
243. Assignability of Ticket.
244. Ticket Conclusive of Passenger's Rights.
245. Limiting Liability for Negligence—as to Paying Passengers.
246. Duty towards Free and Paying Passenger the same.
247. Who are Free Passengers.
248. Limiting Liability for Negligence—as to Free Passengers.
249. Arguments in Support of the Different Views.
250. Special Contracts with Passengers.

CHAPTER XVII.

THE DUTIES AND LIABILITIES DURING TRANSIT.

SECTION 251. Must Furnish Seat.
252. And Means of Refreshment.
253. Must carry Passenger to Destination.
254. Must enable him to Land Safely.
255. Powers of Carrier to Establish Regulations.
256. Passenger may be Ejected for Violation of Regulations.
257. Mode and Place of Ejection.
258. Passenger's Right to Resist Ejection.
259. No Right to Imprison.
260. Non-payment of Fare.
261. Requiring Previous Purchase of Ticket.
262. Showing and Surrendering Ticket.
263. Other Regulations as to Tickets.
264. Concerning use of Carrier's Premises.
265. Classification of Passengers.
266. Passengers on Freight Trains.
267. Dangerous and Disorderly Passengers.
268. Notice of Regulations.
269. Persons under Physical or Mental Disability.

CHAPTER XVIII.

THE PASSENGER'S BAGGAGE.

SECTION 270. Right of Passenger to Baggage.
271. Carrier of Baggage an Insurer.
272. What is Baggage.
273. Rule in last Section Modified by Usage.
274. Carrier may Refuse to Carry—when.
275. Effect of Failure to State Kind.
276. Effect of Failure to State Value.
277. May Enquire as to Contents of Trunk.
278. Knowledge of Carrier that Articles are not Baggage.
279. Owner of Baggage must be Passenger.
280. Need not Accompany Baggage.
281. When Liability of Carrier Begins.

SECTION 282. Before Purchase of Ticket.
283. Baggage left without Notice—Custom.
284. The Baggageman and his Powers.
285. The Baggage Check.
286. When Liability of Carriers Ends.
287. Liability of Carrier as Warehouseman.
288. As to Connecting Carriers.
289. Where Baggage in Custody of Passenger.

CHAPTER XIX.

THE RESPONSIBILITY FOR ACTS OF OTHERS.

SECTION 290. Passenger Carrier not Bound to Carry Beyond Route.
291. Liability Where He Makes Through Contract.
292. Evidence of Through Contract.
293. Where Means of Transportation Belong to Third Parties.
294. Where Third Parties Use Carrier's Means of Transportation.
295. Where Line in Hands of Trustees.
296. Where Line in Hands of Lessees, Purchasers or Others.
297. Liability of Master for Acts of Servants.
298. Application of Foregoing Rules as Between Carrier and Passenger.
299. Rule of Absolute Liability and Reasons Therefor.
300. Relation of Master and Servant Must Exist.
301. Liability for Acts of Independent Contractors.
302. Liability for Acts of Fellow Passengers and Strangers.

CHAPTER XX.

THE ACTS OF THE PASSENGER.

SECTION 303. Carrier not Liable when Passenger Injures Himself.
304. When both Carrier and Passenger are Negligent.
305. Negligence a Question of Fact.—Province of Judge and Jury.
306. Contributory Negligence.—Riding in Dangerous Place.
307. Contributory Negligence.—Riding in Dangerous Manner.

SECTION 308. Contributory Negligence.—Boarding or Leaving Vehicle.
309. Contributory Negligence.—Other Cases.
310. Contributory Negligence.—Loss of Baggage.
311. Contributory Negligence.—Passenger in Sleeping Car.
312. Contributory Negligence.—Acts of Passenger Resulting from Directions of Carrier's Servants.
313. Contributory Negligence of Third Persons.
314. Contributory Negligence of Person in Charge of Children.
315. Contributory Negligence of Carrier of Passenger.

PART IV.

OTHER EXCEPTIONAL BAILMENTS.

CHAPTER XXI.

THE TELEGRAPH, TELEPHONE AND OTHER MODERN AGENCIES.

SECTION 316. Duties and Obligations of Telegraph Companies.
317. Telegraph Company not an Insurer.
318. Action may be Brought by Addressee.
319. Limitation of Liability by Contract.
320. Conditions Contained in Telegraph Blanks.
321. Connecting Lines.
322. Contributory Negligence of Sender.
323. Telephone Companies.
324. Sleeping Car Companies—not Common Carriers.
325. Not Liable as Innkeepers.
326. Contrary View—Sleeping Car Company Liable as an Innkeeper.
327. This View Sustained in Nebraska.
328. The Liability of the Sleeping Car Company.
329. Passenger Elevators.
330. Postmasters and Mail Carriers.

DIVISION III.

QUESTIONS OF PROOF AND DAMAGE.

CHAPTER XXII.

EVIDENCE.

SECTION 331. Introductory.
332. Burden of Proof.—Ordinary Bailments.
333. Burden of Proof.—Innkeepers.
334. Burden of Proof—Common Carriers of Goods.
335. Proof of the Contract.
336. Quantum of Proof Required.
337. Proof that Loss within Excepted Causes.
338. Burden of Proof as to Negligence.
339. Burden of Proof under Special Circumstances.
340. Common Carriers of Passengers.—Burden of Proof of Negligence.
341. Burden of Proof of Contributory Negligence.
342. Burden of Proof.—Telegraph Companies.
343. Burden of Proof.—Sleeping Car Companies.

CHAPTER XXIII.

DAMAGES.

SECTION 344. Measure of Damages.—Ordinary Bailments.
345. Measure of Damages.—Common Carrier of Goods.
346. Measure of Damages.—Common Carrier of Passengers.—For Breach of Contract.
347. Measure of Damages.—In Actions of Tort.
348. Exemplary or Punitive Damages.
349. Measure of Damages.—Telegraph Companies.
350. Damages for Mental Suffering.
351. The Texas Doctrine Denied in some States.
352. Arguments for and against the Texas Doctrine.

THE

PRINCIPLES

OF THE

AMERICAN LAW OF BAILMENTS.

CHAPTER I.

PRELIMINARY.

SECTION 1. The History of Bailment Law.
2. The English Writers.
3. The American Writers.
4. Plan and Arrangement of this Work.

§ 1. **The History of Bailment Law.**—The history of Bailment law in England may be said to begin with the case of *Coggs* v. *Bernard*,[1] decided by the English Court of Queen's Bench in the second year of Queen Anne (1703). Although the subject was slightly touched upon now and then in some of the older reports, the word itself as a title of the law is rarely found in use earlier than the beginning of the eighteenth century. The question raised in *Coggs* v. *Bernard*, was as to the liability of one who had agreed to carry goods safely, but who was not a common carrier, and was not to be paid for his work, and the only question decided was that such a bailee was liable for any damage done to them through his neglect. But Chief Justice Holt, in his judgment expounded for the

1 2 Ld. Ray, 909; 1 Smith Lead. Cas. 284.

first time the English law of Bailments, and finding the common law precedents few and unsatisfactory, went to the civil law for argument and illustration, and from Bracton and other continental jurists drew material for a classification of Bailment law, which, though afterwards slightly altered by Sir William Jones,[1] has remained the classification familiar to every succeeding generation of lawyers unto this day.

"There are," said Chief Justice Holt, "six sorts of Bailment. The *first* sort of Bailment is a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor, and this I shall call Depositum. The *second* sort is when goods or chattels that are useful are lent to a friend gratis, to be used by him, and this is called Commodatum, because the thing is to be restored in specie. The *third* sort is when goods are left with the bailee to be used by him for hire; this is called Locatio et Conductio, and the lender is called locator and the borrower conductor. The *fourth* sort is when goods or chattels are delivered to another as a pawn to be a security to him for money borrowed of him by the bailor, and this is called in Latin, *Vadium*, and in English, a pawn or pledge. The *fifth* sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee who is to do the thing about them. The *sixth* sort is when there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work, or carriage, which is this case."

But that the Chief Justice was not entirely satisfied with his classification appears from his concluding words, "I have said this much in this case because it is of great consequence that the law should be settled in this point; but I do not know whether I may have settled it or may not rather have unsettled it. But however that happens, I have stirred these points which wiser heads in time may settle." For three quarters of a century the law of Bailments received little of either exposition or development in the English courts. At the end of this time a great classical and oriental scholar, a renowned traveler as well as a most accomplished linguist and learned jurist, revived the

[1] Post, § 6.

interest of the English bench and bar. Sir William Jones published his Essay on Bailments, which, though largely the result of the experience and learning of the continental jurists which he had so closely studied, became at once recognized as authority at Westminster Hall, for the reason that it was to so great an extent founded on analogous principles of the common law or fairly deducible from those principles.[1]

During the next half century, or more, the occasional case to be found in the English Reports is an action against a person doing work upon chattels, an innkeeper, or the public wagoner, who then did the land transportation of the country. But with the end of the first half of the present century, the judicial reports of both England and the United States begin to be swelled through a new cause viz., the introduction of transportation of both persons and property by steam. Later, the business methods of the country discover another frequent kind of bailment viz., the delivery of incorporeal personalty as collateral security; and in our own day modern invention in the telegraph, the telephone, the sleeping car and the passenger elevator, calls for the application of the principles of the law of bailments to these new conditions of our civilization and national growth.

The result is that the title Bailment in all its subdivisions, has now expanded to one of the most extensive and important in our law reports and digests; and he is a diligent searcher after precedents who can at this day keep pace with the decisions of the courts on this title alone. Moreover, any law book on the subject becomes old in less than ten years.

§ 2. **The English Writers.**—The Essay on Bailments of Sir William Jones, was published in 1781, a

[1] 2 Am. L. Rev. 77.

second edition in 1798, and a third and fourth in 1823 and 1833. It has been reprinted three times in this country in 1813, 1828, and 1836. Though still frequently cited by text writers, it is now rarely mentioned as authority in the reported cases; and it is curious to observe that it has apparently not been regarded as of sufficient merit to reprint either in England or America since the title Railroads appeared in the reports and digests; nor is mention of it to be found in any of the catalogues of law publishers and book-sellers for many years back. It is also somewhat strange that although English writers in other subdivisions of Bailment law, and analogous subjects, such as Contracts, Carriers, Negligence and Railroads, have incidentally touched upon the general principles of Bailment law, Sir William Jones' essay is still the only English law book upon that distinctive title.

§ 3. **The American Writers.**—As in all other fields of the law the American writers have been more active than those of England, so it is in the law of Bailments, which in this country has been presented in no less than three treatises. First in point of time is the work of Mr. Justice Story, which, published in 1832, has gone through half a score of editions. The work of Mr. Edwards was published in 1858, and has gone through three editions, while the latest work, that of Mr. Schouler, was published in 1880 and again in 1887.

All of Judge Story's writings in the field of jurisprudence are abundantly interspersed with extracts from the Latin authors, but no other certainly to the extent of his work on Bailments. That civil law where Lord Holt found so great an amount of material for his elaborate judicial opinion, Judge Story again exploited for his treatise, and, urged to make an exhaustive study of that law by the founder of the Professorship of law

at Harvard which he at that time held, it is not strange that the result of his labors should be a treatise half English and half Latin, and should give occasion to the criticism of Judge Redfield: "A law book is not only no more useful, for being largely made up of extracts from learned authors in the Latin or French, Spanish or Portuguese, although it may appear far more learned, but it is in fact far less useful to those who have no time to devote to such mere scholarly comments or scholastic refinements."[1] For this reason the treatise of Judge Story is ill-adapted to the student or practitioner of the present day.

The author of the present work on the Principles of the American Law of Bailments, believes that antiquarian research in and disquisition upon the laws of Rome are hardly essential to a book whose object is to show the law of America as taken from the common law of England, modified by the necessities of a different political system, and by the legislation of the different states, and extended by the introduction of modern inventions which call for the application of old principles to new conditions.

§ 4. **Plan and Arrangement of this Work.**—The work is arranged in three divisions, containing in all twenty-three chapters. Commencing with an explanation of the word Bailment and a statement of the requisites to the creation of the bailment contract, it rejects the old classification of bailments of Chief Justice Holt and Sir William Jones and makes of them *two* classes only—the ORDINARY and the EXCEPTIONAL bailment. (Cap. II.)

In the first division are considered the general principles applicable to all ordinary bailments, how

[1] Redf. Carr., Pt. VI, § 616.

they are created and what degree of care is required of the bailee, what are his rights in the bailed chattel, and what are the duties connected with his trust; what are his rights as to compensation and reimbursement, and in what manner the bailment contract may come to an end. (Cap. III.)

Next in order are discussed those bailments where the whole benefit is on the bailor's side (Cap. IV.) and those in which it is all on the bailee's side (Cap. V.)

The mutual benefit bailment next claims our attention *i.e.*, where the bailment is beneficial to both bailor and bailee, and we find that such bailments arise in five cases, viz.: (a) in the case of the hiring of the use of a chattel; (b) in the case of the hiring of the labor or services on or about a chattel of a workman, manufacturer, laborer or artizan; (c) in the case of the hiring of the care or custody of a chattel; (d) in the case of the hiring of a person to transport a chattel from one place to another (Cap VI.); and (e) in the case of the delivery of a chattel to another to hold as security, called a pawn or pledge. (Cap. VII.)

Part I—*Innkeepers.*—The first of the exceptional bailees is the innkeeper, and in Chapter VIII, we find who are innkeepers, and to what extent they are bound to receive all persons who apply, what their liability is at common law for the baggage of their guests, and how that liability has been modified by statute; at what time their responsibility begins and ends; to what extent the guest's own neglect may bar his remedy, and the right of the innkeeper to hold the guest's baggage for his charges.

Part II.—*Common Carriers of Goods.*—In chapter IX we learn who are and who are not common carriers

of goods; in Chapter X that common carriers are public agencies who are subject to public control, and must carry for all without discrimination; that they are not bound to agree to carry beyond the limits of their own lines, yet they may do so. In Chapter XI, their responsibility during the transit is considered, and the rigorous liability which the common law puts upon them. In Chapter XII, the much debated question as to the power of the common carrier to evade his insurance liability by either a contract with or a notice to his customers, is examined with great care and exhaustive research; and the construction to be given to conditions in bills of lading, express receipts, and other written vouchers is stated. In Chapter XIII, we find that the carrier must deliver at a proper place and time and in a proper manner; that he must deliver to the right person; that as to all others but the real owner, interfering with his goods, he has a right of action to recover them; and that his right to his charges for the carriage may be enforced by action, sale or lien.

Part III—*Common Carriers of Passengers.*—In Chapter XIV, are discussed the relation of carrier and passenger; the duty of the carrier to receive every one who demands carriage, and the time when the relation commences and ends. The carrier's duty in regard to his means of transportation, his vehicles, roads, bridges or stations, is considered in Chapter XV, while in Chapter XVI, the contract between carrier and passenger whether through his public advertisement or the tickets which he sells; the right of the carrier to limit his liabilities, and his responsibility towards passengers riding free, are discussed at length. In Chapter XVII we find that a carrier must furnish his passengers with reasonable accommodations, such as a seat, opportunity for obtaining refreshment, and for enter-

ing and leaving his vehicle safely, and that on the other hand he has a right to establish reasonable regulations by which the passenger's conduct while being carried must be governed. In Chapter XVIII the responsibility of the carrier for the passenger's baggage is considered, and a comprehensive definition of the word baggage is presented. Chapter XIX treats of the responsibility of the carrier for the acts of persons to whom he commits a part of his duties, as well as his liability for the acts of his servants, of contractors engaged in doing any kind of work for him, and of fellow passengers, which result in injury to the passenger. In Chapter XX the effect of the passenger's own neglect in not taking care to avoid injury is considered.

Part IV.—In Chapter XXI those modern agencies, the telegraph and telephone, the sleeping car and the passenger elevator, are treated, and in the light of recent decisions in the courts, the principles to be applied in arriving at their liabilities are stated.

In the third division the rules of evidence applicable in actions against bailees (Cap. XXII) and the amount of damages to be given in cases of actionable injuries (Cap. XXIII) are discussed and the conclusions of the courts concisely set forth.

Finally, in no part of the work has the author been content with a mere recital of what the law is, but he has endeavored to give the reasons for the rules and principles established by the courts, and when in different states, different and conflicting views are encountered, he has tried to state fairly the arguments on the two sides of the controversy, and to pass judgment on their weight.

CHAPTER II.

THE TWO GREAT DIVISIONS.

SECTION 5. What a Bailment is.
6. The Classes of Bailments.

§ 5. **What a Bailment Is.**—The etymology of the word Bailment[1] suggests at once its foreign extraction. Shortly, it may be said to be the holding possession of another's personal property in trust for some specific purpose; though many conflicting definitions are to be found in the text books.[2] When A delivers a chattel to B to use in any particular way and when B receives the article with the understanding that it is to be used in a particular way and that when it has been so used it is to be returned to A, a certain contract relation exists between the parties, and this relation is called a bailment. And it does not matter whether the delivery was made with a view to the simple custody of the article for a certain time, or with a view to its being

1 *Bailler (fr.)* to deliver.

2 Neither Lord Holt nor his associates defined the word in their judgments, in Coggs *v.* Bernard. Sir William Jones defined Bailment as "a delivery of goods in trust on a contract, expressed or implied that the trust shall be duly executed and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed." Jones Bail., 117. "Bailment," says Blackstone, "is a delivery of goods in trust upon a contract express or implied that the trust shall be faithfully executed on the part of the bailee," 2 Black. Com. 452, and a "delivery of goods to another person for a particular use," 2 Black. Com. 375. Judge Story objected to the definition of Sir Wm. Jones because it implied that the goods are to be restored or redelivered, when in the case of a consignment to a factor—which he maintained was a bailment—no redelivery is contemplated by the parties, and to those of Blackstone because neither "a faithful execution" nor "a particular use" were essential ingredients in all bailments. Having thus disposed of his predecessors in the field, Judge Story gave his own definition, viz: "A delivery of a thing in trust for some special object or purpose, and upon a contract express or implied to conform to the object or purpose of the trust," Story Bail. § 2. At this point no less a personage than Chancellor Kent enters the arena

made use of, or being worked upon, or with a view to its being carried to a particular place — the relation between the parties is obviously the same in all these cases. There is, first, the delivery which creates a trust in the person receiving the possession of the article; there is then the express or implied contract by the party to keep, carry, use or do work upon, as the case may be; and there is the express or implied condition to redeliver the chattel when the objects of the trust shall have been fulfilled. It is in transactions in which all these elements are present that we find the most frequent illustrations of the modern bailment contract; and yet some of them may be absent and there be a bailment nevertheless; for example:

1. A redelivery of the chattel bailed may not be contemplated, as in the case of the factor[1]; or the common carrier, whose contract is not to deliver to the shipper, *i. e.*, bailor, but to some third person to whom the goods are directed.[2]

2. A bailment may be created without any express agreement to receive and hold for a particular purpose. It may arise from the bare fact of the thing coming into the actual possession and control of a person fortuit-

falling at once foul with Judge Story at the point where he had attacked Sir William Jones. Chancellor Kent refuses to concede that a factor is a bailee, considering that to apply the word bailment to cases in which no delivery or redelivery to the owner or his agent is contemplated is "extending the definition of the term beyond the ordinary acceptation of it in the English law," 2 Kent Com. § 40. Therefore Chancellor Kent would define the word as follows: "A delivery of goods in trust upon a contract express or implied that the trust shall be duly executed and the goods restored by the bailee as soon as the purpose of the bailment shall be answered," Id. 558. In the controversy between these two eminent jurists which followed, Judge Story's arguments seem the stronger, even in the light of the meagre precedents in the books of his day, but now, nearly half a century having rolled by, and the law of bailments having grown as trade and commerce have grown and the adjudication of the courts with them, the position of Judge Story can no longer be assailed. The modern cases unanimously include the factor as a bailee. Morss *v.* Stone, 5 Barb. 516; Hunt *v.* Wyman, 100 Mass. 198; Weir Plow Co. *v.* Porter, 82 Mo. 23; Foster *v.* Bush, 16 South. Rep. 625 (Ala.)

1 See the previous note.

2 See *post*.

ously or by mistake.[1] Thus, where the property of one person is voluntarily received by another by delivery of the owner for some different purpose from that of keeping it, and upon an express or implied agreement of a different kind, which has been answered or performed, and the property remains in the hands of such party without further agreement, the law implies a contract for the keeping of the property until it shall be restored to the proprietor or his agent.[2] So, where another's property comes into one's hands, through the owner's neglect.[3] Necessary or involuntary deposits, *i. e.*, such as are suddenly and almost involuntarily made by the depositor in cases of extraordinary peril and difficulty, such as in cases of fire, shipwreck, inundations, insurrections, attacks by mobs, and other casualties and pressing emergencies, the common law treats as bailments.[4] So, though a finder of a chattel is not bound to take it up, but may leave it where it lies, yet if he does take it into his possession he becomes at once bound (without any actual contract, and without any actual intention to bind himself), to the owner of the property, for its safe-keeping and return—in other words, he becomes a bailee of the lost chattel.[5] There is also, in the

1 Phelps *v.* People 72 N. Y. 357; Newhall *v.* Paige, 10 Gray 366; Cox *v.* Reynolds, 7 Ind. 257; Osgoodby *v.* Liemberner, 22 Alb. L. J. 114, Story Bail. § 83.

2 Smith *v.* R. Co., 27 N. H. 86; 59 Am. Dec. 364.

3 Morris *v.* R. Co., 1 Daly, 202; A, who had rented rooms of B, at the expiration of the lease went away, leaving there some trunks and a stove. *Held*, that this was an involuntary deposit. Preston *v.* Neale, 12 Gray 223.

4 There is another class of deposits "which might indeed fall under the head of necessary deposits, but which we have ventured to call involuntary deposits. Such is the case where lumber floating in a river is, by a sudden flood or freshet, lodged on the land of a stranger, and left there by the subsidence of the stream. Such, also, is the case of trees blown by a tempest upon the land of a stranger, and also of goods lodged in the like manner by a whirlwind or tornado in a distant field of a stranger. . . . In respect to the duty of the owner of the land to preserve the property thus by accident thrown upon his land, it would probably be held that it was of the same nature and extent as that of an ordinary finder of goods." Story Bail. § 83 a.

5 Smith *v.* R. Co., 27 N. H. 86; 59 Am. Dec. 364. He will be a gratuitous bailee ordinarily, except when by statute he may claim compensation for its keeping.

civil law a species of bailment called sequestration, which is a delivery of property under a judicial order, or a deposit made by agreement, in the hands of an indifferent person, between the parties engaged in litigating the title, until the same shall be determined, with a stipulation on the part of the bailee that he will deliver the same to the party to whom it shall be adjudged.[1] A court officer is an involuntary depository of money which is paid into court and which he is obliged to take charge of,[2] or of articles which come into his possession, even though there was no legal duty on him to receive them.[3]

Yet it must be borne in mind that as bailment is a contract relation, no one can be made a bailee without his own consent, either express or implied.[4] Any kind of fraud practiced on the part of a borrower, in order to procure a loan, either by a suppression of the truth or by express falsehood, will avoid the contract and render him liable for all casualties. In this contract, it is said, more than in all others, the law demands openness and honesty, and will not tolerate any concealment of facts that might have a tendency to prevent the loan,[5] and in such case there is no legal delivery, and no consent to the taking, since consent, in law, is more than a mere formal act of the mind, and must be unclouded by fraud.[6] A pledge obtained by false representations of the creditor, though unredeemed by the debtor, vests no interest in the pledgee.[7]

1 Story Bail. § 46; Edw. Bail. 47.

2 Aurentz *v.* Porter, 56 Pa. St. 118.

3 Phelps *v.* People, 72 N. Y. 334; Mott *v.* Pettit, 1 N. J. L. 298; Cross *v.* Brown, 41 N. H. 283; Witowski *v.* Brennan, 41 N. Y. Sup. Ct. 284; Moore *v.* State, 47 Md. 467; 28 Am. Rep. 483; Briggs *v.* Dearborn, 99 Mass. 50.

4 Lloyd *v.* West Branch Bk. 15 Pa. St. 172; 53 Am. Dec. 581; Samuels *v.* McDonald, 11 Abb. Pr. N. S. 344; Michigan Cent. R. Co. *v.* Carrow, 73 Ill. 348; 24 Am. Rep. 248; Fay *v.* The New World, 1 Cal. 348; Foster *v.* Essex Bank, 17 Mass. 479; 9 Am. Dec. 168; Green *v.* Birchard, 27 Ind. 483; Bohannan *v.* Springfield, 9 Ala. 789; Schoul. Bail. 75.

5 Edw. Bail. 160; Story Bail. § 243; Jones Bail. 70.

6 Laws. Contr. Chap. VI.

7 Mead *v.* Bunn, 32 N. Y. 275.

§ 6. **The Classes of Bailments.**—The division of bailments made by Lord Holt, in *Coggs* v. *Bernard*, was modified by Sir William Jones, who arranged them under five heads, as follows: 1. *Depositum*: A bare, naked bailment of goods delivered by one man to another to keep gratis for the use of the bailor. 2. *Mandatum*: A delivery of goods to somebody who is to carry them, or do something about them gratis. 3. *Commodatum*. Where goods or chattels that are useful are lent to a friend gratis to be used by him. 4. *Vadium*, or *Pignus*, or Pawn, or Pledge. 5. *Locatio-conductio*, a hiring for reward; which has these four divisions, viz.: (*a*) *Locatio rei*, the hiring of a thing for use; (*b*) *Locatio operis faciendi*, the hiring of work and labor upon a thing; (*c*) *Locatio custodiae*, the hiring of care or custody over the thing; (*d*) *Locatio operis mercium vehendarum*, the hiring of the carriage of goods from place to place.

It is better, however, to make of the subject of Bailments two great divisions, viz.: The ORDINARY and the EXCEPTIONAL bailment.

Under the first division fall: 1st. The bailment for the bailor's sole benefit, which includes *depositum* and *mandatum*. 2nd. The bailment for the bailee's sole benefit, which includes *commodatum*. 3rd. The bailment for the mutual benefit of bailor and bailee, which includes *pignus*, and *locatio-conductio* with its four divisions.

The second division includes the cases of innkeepers, common carriers, and other public agencies, upon whom, for reasons of public policy, the law has placed a somewhat different liability.

When the bailment is for the sole benefit of the bailor, it is evidently just, for reasons stated hereafter, that the law should demand only slight diligence upon the part of the bailee, and that consequently the bailee should, in case of the loss or damage of the article, only be liable

for gross negligence. Second, when the bailment is for the sole benefit of the bailee, a very great amount of care is properly demanded, and the bailee is properly held responsible for a very minor degree of negligence. The third kind of bailment holds an intermediate place between these two. It is a delivery for mutual benefit. Each party is to be advantaged by the bailment. In this case the law expects ordinary diligence, or such attention to the object of the bailment as a man ordinarily bestows upon business matters, and therefore, ordinary neglect will in such a case render the bailee liable for loss of or injury to the article bailed. In the fourth class of bailments the law has, upon grounds not applicable to the others, thrown generally upon the bailee the extraordinary responsibility of an insurer.

DIVISION I.

THE ORDINARY BAILMENT.

CHAPTER III.

THE GENERAL PRINCIPLES.

SECTION 7. Subject Matter of Bailment a Chattel.
8. The Test of a Bailment.
9. The Parties to a Bailment.
10. Consideration in Bailments.
11. The Care and Diligence Required of Bailees.
12. Negligence Defined and Illustrated.
13. Modification of Liability by Agreement.
14. Modification of Liability by Acts or Conduct of Bailor.
15. The Bailee's Special Property in the Chattel.
16. Negligence Immaterial in Certain Cases.
17. Bailee's Property Limited to the Trust.
18. The Trust Duties of the Bailee.
19. (a) To Hold of the Bailor.
20. (b) To Follow His Instructions.
21. (c) To Follow the Contract.
22. (d) To Re-deliver the Thing.
23. Excuses for Non-Delivery.
24. The Duties of the Bailor.
25. Compensation and Reimbursement.
26. The Lien Upon a Chattel for Services.
27. The Bailee's Lien Generally.
28. Joint Bailors and Bailees.
29. The Termination of the Bailment.

§ 7. **Subject Matter of Bailment a Chattel.**—Only chattels personal, or things movable, which are capable of being delivered, can be the subject of a bailment of any kind.[1] If A, for example, permits B to use his shed, this is not a bailment but a license, for the shed is real and not personal property.[2] The relation between one who rents another a house or lodgings or rooms in a

[1] Edw. Bail. 48; Schoul. Bail. 92.

[2] Williams v. Jones, 3 H. & C. 256.

house and the occupant, is that of landlord and tenant and not that of bailor and bailee.[1] Yet when chattels of B are deposited with A in A's house it does not affect the nature of the bailment that some particular portion of A's house is selected and set apart for their use. In a New York case the defendant was the owner of a storage warehouse in which the plaintiff had stored her household furniture. The space alloted to her was enclosed by wooden partitions with a door upon which were two locks, the key of one of which was kept by B. The charges were sometimes described as rent and sometimes as for "storage." It was held that A was a bailee for hire and answerable as such. "It matters not," said the court, "that a space was assigned to the plaintiff for the storage of her goods, and separated from the rest of the room in which it was by board partitions. That was by special arrangement between the parties, and the defendant accepted the goods in that way. They were in bulk in his storehouse, under his charge and in his keeping, just as they would have been if they had been placed in a large box or in locked-up boxes in the same room. It is a species of bailment like that existing in the case of the depositor in a safe-deposit company, who hires a box for his valuables and keeps the keys."[2]

§ 8. **The Test of a Bailment.**—In order that the bailment relation shall be created, it is usually essential[3] that the agreement (whether this agreement be a matter of express contract between the parties or be implied in law), should intend that the very chattel which is given into the hands of the bailee shall be redelivered to the bailor. Without this the transaction

1 Trust *v.* Pirsson, 1 Hilt. 292.

2 Jones *v.* Morgan, 90 N. Y. 4; 43 Am. Rep. 131.

3 The exception is where no re-delivery is contemplated. See *ante*, p. 9.

may be a gift or it may be a sale, but it cannot be a bailment.[1]

The distinction between a bailment and a sale is always this: When the identical thing delivered is to be restored, the contract is one of bailment, and the title to the property is not changed. But when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale.[2]

If the identical thing is to be returned, it matters not that it is to be returned in an altered form, as logs delivered to a lumberman to be manufactured into boards,[3] or grain delivered to a miller to be ground into flour,[4] or cotton delivered to manufacturers to be turned into printed calico.[5] Nor, it is held, is the character of the transaction changed when grain delivered at a mill to be ground or at an elevator to be stored is by usage or agreement mixed with other grain of the same kind, the return to be made out of the common mass.[6]

1 Powder Co. *v.* Burkhardt, 97 U. S. 110; Bretz *v.* Diehl, 117 Pa. St. 589; 2 Am. St. Rep. 706; Norton *v.* Woodruff, 2 N. Y. 154; Seymour *v.* Wyckoff, 10 N. Y. 216; Reed *v.* Abbey, 2 Thomp. & C. 380; Hurd *v.* West, 7 Cow. 752; Inglebright *v.* Hammond, 19 Ohio, 337; 53 Am. Dec. 430; Chase *v.* Washburn, 1 Ohio St. 224; 59 Am. Dec. 623; Butterfield *v.* Lathrop, 71 Pa. St. 225; Johnson *v.* Baker, 37 Iowa, 200; Moore *v.* Holland, 39 Me. 307; Slaughter *v.* Green, 1 Rand. 3; 10 Am. Dec. 488; Marsh *v.* Titus, 6 Thomp. & C. 29; 3 Hun, 550; Buffum *v.* Merry, 3 Mason, 478; Ewing *v.* French, 1 Blackf. 353; Baker *v.* Woodruff, 2 Barb. 520.

2 Bronson, C. J., in Mallory *v.* Willis, 4 N. Y. 76; Rahilly *v.* Wilson, 3 Dill. 420; Austin *v.* Seligman, 18 Fed. Rep. 519; Wilson *v.* Finney, 13 Johns. 358; Westcott *v.* Tilton, 1 Duer. 53; Westcott *v.* Thompson, 18 N. Y. 363; Hyde *v.* Cookson, 21 Barb. 92; Becker *v.* Smith, 59 Pa. St. 467; Bourg *v.* Lopez, 36 La. An. 439.

3 Baker *v.* Roberts, 8 Greenlf. 101; Mallory *v.* Willis, 4 N. Y. 77.

4 Mallory *v.* Willis, 4 N. Y. 76; Foster *v.* Pettibone, 7 N. Y. 433; 57 Am. Dec. 530; Smith *v.* Clark, 21 Wend. 83; 34 Am. Dec. 213; Bretz *v.* Diehl, 117 Pa. St. 589; 2 Am. St. Rep. 706.

5 Wood *v.* Orser, 25 N. Y. 350.

6 Slaughter *v.* Green, 1 Rand. 3; 10 Am. Dec. 488; Mallory *v.* Willis, 4 N. Y. 77; Chase *v.* Washburn, 1 Ohio St. 251; 59 Am. Dec. 623; Inglebright *v.* Hammond 19 Ohio, 337; 53 Am. Dec. 430; Bretz *v.* Diehl, 117 Pa. St. 589; 11 Atl. Rep. 893; Andrews *v.* Richmond, 34 Hun. 20; Ledyard *v.* Hibbard, 48 Mich. 421; 42 Am. Rep. 474, 12 N. W. Rep. 637; Nelson *v.* Brown, 44 Ia. 455.

It is a bailment where goods are sold by A to B, the agreement being that they are to remain the property of A until paid for,[1] or to be returned to A if not paid for;[2] where one receives goods from another with a right to try them and to purchase or return them if not suitable;[3] where a person is given a right to use the goods for a certain time with the privilege of purchasing them during or at the end of that time;[4] where goods are received to be sold and accounted for to the owner.[5] So a vendor who, after a sale is completed and the title has passed, agrees to store or deliver the property, is a bailee.[6] In all these cases but the last, the title remains in the original owner.

On the other hand, where the title to the property passes with a right in the vendor to rescind it for cause, it is a conditional sale and not a bailment.[7]

The deposit of money in a bank is not a bailment, for it is not intended that the banker shall return to the depositor the identical coin or bank notes he received, but only the amount of the deposit in any legal tender.[8] And the same is true of all loans of money, and of all

1 Harrington *v.* King, 121 Mass. 269; Dunlap *v.* Gleason, 16 Mich. 158; 93 Am. Dec. 231; Kohler *v.* Hayes, 41 Cal. 455; King *v.* Bates, 57 N. H. 446; Wheeler & etc. Co. *v.* Heil, 115 Pa. St. 487; 2 Am. St. Rep. 575; 8 Atl. Rep. 616; Henry *v.* Patterson, 57 Pa. St. 346.

2 Porter *v.* Pettengill, 12 N. H. 299.

3 Hunt *v.* Wyman, 100 Mass. 198; Colton *v.* Wise, 7 Ill. (App.) 395. Plaintiffs delivered certain jewelry to one R., with a memorandum to the effect that it was sent for his inspection, that it belonged to plaintiffs, and that it was to be returned to them on demand, and that sale would take effect only from their approval of R.'s selection, the goods to be held until then subject to their order. *Held*, that the paper showed a bailment merely, and not a conditional sale.—Rumpf *v.* Barto 38 Pac. Rep. 1129 (Wash.)

4 Chamberlain *v.* Smith, 44 Pa. St. 431; Dunlap *v.* Gleason, 16 Mich. 158; 93 Am. Dec. 231; Sargent *v.* Gale, 8 N. H. 325.

5 Morse *v.* Stone, 5 Barb. 516; Furlow *v.* Gillian, 19 Tex. 259; Middleton *v.* Stone, 111 Pa. St. 587; 4 Atl. Rep. 523.

6 Oakley *v.* State, 40 Ala. 372;

7 Bryant *v.* Crosby, 36 Me. 562; 58 Am. Dec. 767; see Heryford *v.* Davis, 102 U. S. 235.

8 4 Laws. Rights, Rem. & Pr. 1696; Story Bail. § 88. The transaction amounts to a loan with or without interest, and creates the relation of debtor and creditor; the bank receives the money deposited and undertakes to repay the same on demand at all events. The fund is mingled with other moneys and becomes an absolute debt due from the bank, for which it is liable even though the money be lost, without any fault on its part.—Edw. Bail. 66.

loans of other kinds of chattels which are intended to be consumed by the borrower and their equivalent in kind and amount returned to the lender.[1] It is only where the banker receives the thing as a special deposit to be returned exactly as received, as a bag of gold or a bond or other chattel, that he becomes a bailee.[2] The leading case of this kind is *Foster* v. *Essex Bank*,[3] where the deposit consisted of a large quantity of gold placed in a chest locked and left at the Essex Bank "for safe keeping," the depositor taking the key with him. The cashier or chief clerk of the bank fraudulently took of the gold deposited thirty-two thousand dollars, and absconded, and it was held the bank was not liable, inasmuch as its officers had taken the same care of the deposit as they did of their own funds.

A loan for consumption, called a *mutuum*, was recognized as a bailment by the civil law, where, for example, the bailee was bound to deliver, not the specific article lent to him, but, at his opportunity, something of the same kind, as where the thing received, such as corn, wine, oil, or money, was to be returned in kind. But this species of bailment is unknown to our law.[4]

Where goods are ordered to be made, while they are in progress, the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in process of being made, the maker may intend them for the person ordering, still he may afterwards deliver them to another and thereby

1 Caldwell *v.* Hall, 60 Miss. 330; 45 Am. Rep. 410; Shoemaker *v.* Hinze, 56 Wis. 116; 10 N. W. Rep. 86; Rankin *v.* Craft, 1 Heisk. 711; Cabaniss *v.* Ponder, 65 Ga. 134; Howard *v.* Roeben, 33 Cal. 399; Hathaway *v.* Brady, 26 Cal. 581; Chiles *v.* Garvison, 32 Mo. 475.

2 Bowers *v.* Evans, 71 Wis. 133; 36 N. W. Rep. 629.

3 17 Mass. 479; 9 Am. Dec. 168.

4 Story Bail. § 228; Schoul. Bail. 5, 75; Edw. Bail. 186. But see Fosdick *v.* Greene, 27 Ohio St. 484; 22 Am. Rep. 328.

vest the property in the party so receiving them.[1] But where the owner of a chattel delivers it to another to be repaired and renovated by the labor and materials of the latter, the property in the article as thus repaired and improved is all along in the original owner for whom the repairs were made and not in the person making them. And the original owner, so far from losing his general property in the thing thus placed in the hands of another person to be repaired, acquires that right to whatever accessorial additions are made in bringing it to its new and improved condition.[2] Nor does it make any difference that the labor and materials put upon the article greatly exceed in value that of the article when it was delivered to the bailee. Thus in one case,[3] A sent to B, a wagon-maker, an old wagon which when repaired by him was worth $90, but B in repairing it had expended in time and material nearly $80. It was held, nevertheless, to be a bailment.[4]

The distinction is very important. If A delivers his wheat to a miller to be ground into flour and before A receives his flour it is destroyed by fire or other cause, the loss falls on A unless the miller's negligence contributed to the loss. On the other hand, if A's wheat

1 Gregory *v.* Stryker, 2 Denio, 628 citing 2 Kent's Com. 361; Merritt *v.* Johnson, 7 Johns. 473; 5 Am. Dec. 289; 1 Chit. Pl.. 7th Am. ed., 381; Atkinson *v.* Bell, 8 Barn. & C. 277; 2 Chit. Com. L. 270.

2 Gregory *v.* Stryker, *supra.*

3 Gregory *v.* Stryker, 2 Denio. 628.

4 "The general property," said the Court, "must be in one party to the exclusion of the other, for surely they are not tenants in common of the thing repaired. Shall we then say, that where the value of the repairs falls below that of the dilapidated article on which they were made, the original owner has title to the article in its improved condition; and *vice versa*, where they exceed it in value, title to the article as repaired and improved, passes over to the person by whom the repairs were made? Such a rule would certainly be plain enough, and probably might be applied without great difficulty, to any particular case. But it would be found to give rise to a variety of questions never heard of in actions growing out of the reparation of decayed or injured articles; and the rule itself, I am pursuaded, has not so much as the shadow of authority for its support. The principle contended for by the defendant is not necessary for the security of the mechanic by whom the repairs are made. He has a lien for his labor and materials, and may retain possession until his just demands are satisfied."

was delivered to the miller to be paid for in other flour, the miller has at once become a debtor to A for the quantity of flour agreed upon, and even if all his flour is destroyed he will be obliged to obtain other flour with which to pay his debt to A. And the distinction is also important when claims of creditors of the bailee intervene.[1]

§ 9. **The Parties to a Bailment.**—The person in whose possession the chattel is, is called the *bailee*; the owner or the one who intrusted the possession to the bailee is called the *bailor*. The bailment being a contract relation, the parties thereto must be capable of contracting. The subject of the capacity of parties to enter into contracts is fully discussed in my work on Contracts and need not be repeated here.[2]

The law makes a man responsible for acts done by those whom it denominates his servants (but who are frequently called agents or employes), while engaged in the business or work in which he employs them. If the relation of master and servant subsisted between them on the particular occasion, and the servant makes a careless mistake, either of omission or commission, the law holds it to be the master's business negligently done; but it does not presume that the servant's willful act of mischief is the act of his principal; nor does it presume that the relation of master and servant extends to that particular act; on the contrary, the presumption of law is that the master did not intend nor assent to an act in itself criminal. He is, therefore, an-

1 "If the transaction was a conditional sale, whether in form or in substance, we have held the title in the vendee, and therefore subject to the claims of his creditors; but, if it was a bailment, we have held the title in the bailor, and not subject to any claims of the vendee's creditors." Brown *v.* Billington, 29 Atl. Rep. 905 (Pa.); Monjo *v.* French, *Id* 907; Ferguson *v.* Lauterstein, 28 Atl. Rep. 852 (Pa.)

2 See Laws. Contr. Chap. V.

swerable for his servant's negligence and want of skill, but not for his willful injuries. These familiar principles illustrated also in a subsequent chapter, apply in all their force to the ordinary bailee.[1]

§ 10. **Consideration in Bailments.**—The rule is elementary that every contract requires a consideration to support it, a mere naked promise being *nudum pactum* and unenforceable.[2] If A promise B to give him his horse or to lend him $100, and there is no benefit to A or any detriment to B arising out of the transaction, B has no remedy if A changes his mind. The same must logically be the result if A breaks his promise to store B's box in his house or to carry B's trunk to the next town without charge; and one can not, therefore, be sued for refusing to carry out his promise to become a gratuitous bailee.[3]

But the service once undertaken, the conditions are changed. The act of entrusting a thing with another, and his undertaking the care of it, the law considers a sufficient consideration for his faithful discharge of the trust. The custody of the property is parted with on the faith of the owner in the integrity and care of the person to whom it is delivered; and though he engages to keep it gratuitously he is responsible for a faithful execution of the trust reposed in him on the ground that his failure to keep the promise made or the undertaking implied by law, works an injury or prejudice to the

1 See School. Bail. 142, 143; Emerson *v.* Fisk, 6 Greenlf. 200; 19 Am. Dec. 206; Woodward *v.* Cutter, 33 Vt. 49; Hall *v.* Warner, 60 Barb. 198; St. Losky *v.* Davidson, 6 Cal. 643; Androscoggin R. Co. *v.* Auburn Bank, 48 Me. 335; Commercial Bank *v.* Martin, 1 La. Ann. 344; 45 Am. Dec. 87; Aldrich *v.* R. Co. 100 Mass. 31; 1 Am. Rep. 76.

2 Laws. Contr. § 91.

3 Thorne *v.* Deas, 4 Johns. 84; Elsee *v.* Gatward, 5 Term Rep. 143; Balfe *v.* West, 13 Com. B. 466; Samuels *v.* McDonald, 11 Abb. Pr., N. S., 344; McGee, *v.* Bast, 6 J. J. Marsh, 455; Fellowes *v.* Gordon, 8 B. Mon. 415; Ferguson *v.* Porter, 3 Fla. 88; Jenkins *v.* Bacon, 111 Mass. 373; 15 Am. Rep. 33.

party with whom the agreement is made.[1] Therefore, though A could not be sued for failing when the time came to take B's trunk, yet if he did take it and on the way negligently lost it, he would be liable for its value, though he were to have nothing for his pains.[2]

§ 11. **The Care and Diligence Required of Bailees.** —The most important question in the law of bailments is the amount of care which a man has a right to expect from another in whose possession his goods are, under the various circumstances of the case, and the amount of the responsibility of him, the bailee, for negligence or want of care. The law never permits negligence of any kind in the execution of a contract, but its rule varies as to the degree of care it exacts under varying circumstances.[3] There are many shades of care "from the slightest momentary thought or glance of attention to the most vigilant anxiety and solicitude,"[4] but the law is not satisfied with the first nor does it exact the second. The word negligence is a negative, not a positive word. Negligence is, after all, simply the absence of care according to the circumstances of the particular case. The want of a very high degree of care is slight negligence; the want of ordinary care is ordinary negligence, while the want of any care at all is gross negligence. It has indeed been questioned by high judicial authority whether any intelligible distinction exists between negligence and gross negligence,[5] and it is said

1 Edw. Bail. 58; Laws. Rights, Rem. and Pr. § 1692; McCaulay *v.* Davidson, 10 Minn. 418; Eddy *v.* Livingston, 35 Mo. 487; 88 Am. Dec. 122; Jenkins *v.* Motlow, 1 Sneed, 248; 60 Am. Dec. 154; Whitney *v.* Lee, 8 Metc. 91; Kirkland *v.* Montgomery, 1 Swan. 452; Graves *v.* Ticknor, 6 N. H. 537; Smedes *v.* Bank, 20 Johns. 377; 3 Cow. 362; Kellogg *v.* Sweeney, 1 Lans. 402; Roulston *v.* McClelland, 2 E. D. Smith, 60; Rutgers *v.* Lucet, 2 Johns. Cas. 92; A reciprocal benefit between bailor and bailee, from the deposit of the former's picture in the latter's gallery, is a sufficient consideration to support a promise to take care of the picture.—Hardegg *v.* Willards, 33 N. Y. S. 25.

2 4 Laws. Rights, Rem. and Pr. § 1709.

3 Edw. Bail. 44.

4 Jones Bail. 4, 5.

5 Denman C. J. in Hinton *v.* Dibbin, 2 Q. B. 646.

that the latter is the same as the former *plus* a vituperative epithet,[1] and that any negligence is gross in one who undertakes a duty and fails to perform it.[2] But it seems to be conceded that, as in the law of bailments, there is a difference between the degree of negligence for which different classes of bailees are responsible, the terms "gross," "slight" and "ordinary" may be usefully retained as descriptive of that difference until at least some better terms are invented.[3]

§ 12. **Negligence Defined and Illustrated.**—Negligence is the absence of that care or diligence which the circumstances of the case call for. What would be care under one set of circumstances would not be so under another; what would be diligence with one kind of a chattel would not be so with another; what would be care in one place would not be in another; and hence it will be found that the circumstances which may be decisive in deciding as to the sufficiency of the care exercised by a bailee in the carrying out of his trust may be classed under four heads—viz.: 1. The nature and value of the article. 2. The customs of the place or trade. 3. The condition of the country or climate. 4. The condition of the time.

1. Articles of great value, such as may be easily injured, demand a greater degree of care than those of less value. A man who would carry glass with as little care as he would iron, would certainly be guilty of negligence. The same care need not be taken of the canvas upon which a picture is about to be painted as that upon which a picture actually is painted. A load of

[1] Rolfe B. in Wilson *v.* Brett, 11 M. & W. 113.

[2] Willes J. in Lord *v.* R. Co., L. R. 2 C. P. 340; Phila. R. Co. *v.* King, 14 How. 468; The New World *v.* King, 14 How. 469; Storer *v.* Gowen, 18 Me. 177; Briggs *v.* Taylor, 28 Vt. 185.

[3] Giblin *v.* McMullin, L. R. 2 P. C. 336; First Nat. Bk. *v.* Ocean Bk. 60 N. Y. 278; 19 Am. Rep. 181.

stone or coal or wood might be left uncovered and unprotected from the elements, while a similar course as to a library of costly books would be highly censurable. So, if an article is so heavy that it can be carried away only with great difficulty—a block of marble or a ship's anchor, for example—it is not necessary to guard it or lock it up against thieves, while a box of jewels or a bag of money requires a different kind of care and vigilance. Of course, the bailee must be informed of the value of the thing he has. It is very evident that the care demanded of the bailee of a locked chest containing jewels, would be very much lessened by the fact that he was not made acquainted with its contents. He would not be required to presume that it contained jewels, nor to keep it with the care with which he should guard that kind of property.[1]

2. What every one around me does without danger, I can hardly be blamed for doing also, and if in so acting the thing in my custody is lost or damaged, it would be unjust to hold that the chance mishap had made me guilty of negligence, for what one can not foresee, one ought not to be punished for not foreseeing. Hence, how one's neighbors act under similar circumstances is generally a sufficient guide.[2] In a Massachusetts case it is said:[3] "If the defendants exercised due and ordinary care in the custody of the property, they cannot be charged for its loss. What constituted such care was a question of fact, to be judged of with reference to all the circumstances, and especially with reference to the degree of care which other persons engaged in similar business in the vicinity were in the habit of bestowing on property similarly situated. The standard

1 Jones Bail. 38; Edw. Bail. 72.

2 Browne Carr. § 9; Laws. Us. and Cust. § 168.

3 Cass v. R. Co., 14 Allen. 448; and see Lechtenhein v. R. Co., 11 Cush. 70; Chenowith v. Dickinson, 8 B. Mon. 156.

of ordinary care varies, necessarily, in different localities. One degree of diligence would be required for the city and a less or greater for the country, depending on a great variety of circumstances. The defendants offered to prove that there was exercised by them in relation to this property that care which other railroad corporations in Boston usually exercised in relation to such property. The court excluded this evidence, and on this ground the exceptions are well taken." The question in an Alabama case[1] was whether a bailee had been guilty of negligence in going into a cotton gin house with an open lamp, and the court said that this must be determined by the answer to another question viz.: "What is the general custom of gin holders in regard to carrying lights about their gin houses when they contain cotton?"[2] Where an agent was sued by his principal for $20,000 belonging to the latter which had been stolen from him, and it appeared that the money was at the time of the loss kept in an iron safe in a room usually occupied by two persons, but then left unguarded and not very secure, it was held competent for him to show that custodians of money do not usually look to doors or windows for protection, but to their vaults and safes.[3] And where the question was whether a guest at a hotel had been guilty of negligence in leaving the key in the door of his room, in which was a large sum of money, evidence of the usage of guests at the hotel of leaving keys in the doors of their rooms was held to be relevant.[4] The drivers of horses and carriages on the highways,[5] and the masters and pilots of ships and steamboats on the waters,[6] must follow the

[1] Maxwell *v.* Eason, 1 Stew. 114.

[2] And see Brown *v.* Hitchcock, 28 Vt. 452; McKibben *v.* Bakers, 1 B. Mon. 122.

[3] Wright *v.* Central R. Co., 16 Ga. 38.

[4] Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417.

[5] Leame *v.* Bray, 3 East, 593; Tueley *v.* Thomas, 8 Car. & P. 104; Bolton *v.* Calder, 1 Watts, 360.

[6] Morrison *v.* General Steam Nav. Co., 8 Exch. 733; General Steam Nav. Co. . Morrison, 13 C. B. 581; Barrett *v.* Wil-

customary mode of passing each other, and a failure to comply with such custom will amount to negligence.

3. Men, says Mr. Browne,[1] do not turn their horses into a quagmire any more than ants carry out their pupae into the frost. There is no want of care in him who takes out a book on a summer day and leaves it on his own lawn. The same act done under clouds in mid-winter would be negligent. The man who lies on his back on a hill-side and stares up into the sky is running little or no risk if the weather is fine, but the same gazing at the same sky, where the stars ought to be, would be rash, if he had a rail under his neck and a rail under his feet and the express was due. Of course, these are extreme cases.

4. What was negligence fifty or a hundred years ago might not be negligence now, and what was diligence then might be negligence now. In primitive times flocks were permitted to roam unattended at night, but if conditions had changed and it had become necessary to pen them in folds at night, to omit to do so would be a want of diligence. In many parts of America as late as Story's day[2] it was usual, at least in the newly settled districts, to leave not only barns and stables, but even dwelling houses unlocked at night. But even then, in the cities, where the temptation was more pressing, it would have been deemed a great want of caution to act in the same manner; and to-day, the tramp being abroad on all our highways, it would show a lack of care and prudence almost everywhere. To ascertain what is negligence "one must understand to some ex-

liamson, 4 McLean, 595; Myers *v.* Perry, 1 La. An. 373; The City of Washington, 92 U. S. 31; The Clement, 2 Curt. 363; Jones *v.* Pitcher, 3 Stew. & P. 135; Boyce *v.* The Empress, 3 West. L. J. 174; Drew *v.* The Chesapeake, 2 Doug. 33; Harding *v.* The Maverick, 5 L. R. 106; Domingo *v.* Merchants' Ins. Co., 19 La. An. 481; Sampson *v.* Hand, 6 Whart. 324.

1 Browne Carr. § 10.

2 Story Bail. § 11.

tent the nature and spirit of the times. A gang of robbers in our neighborhood would make us more careful of our own property, and therefore those whose property we have in keeping have a right to expect an equal amount of care for their interests. In lawless times it might have been negligence not to have possessed a blunderbuss, but that can not be said of to-day. Where the laws are bad, an individual's own care is the more necessary. A man on an island need not build a wall to keep out his neighbor's cattle, and so the police of a country are a kind of wall around a man's dwelling; the existence of such an institution will necessarily lighten the responsibility of each private individual."[1]

§ 13. **Modification of Liability by Agreement.**— If a bailee contracts to take more care than that which the law requires him to take, his liability will be enlarged according to the terms of his contract, as, for example, where he promises to keep or carry the goods safely[2] or says "I will warrant the goods shall go safe."[3] But a mere promise to return a thing or to return it in good order is not usually construed to insure it against losses or casualties occurring without the bailee's fault.[4]

So by contract the bailee may be obliged to take special care of the property,[5] as in an Indiana case where an agricultural society inviting exhibitors at its fair adver-

1 Browne Carr. § 11.

2 Browne Carr. 30; Story Bail. 33; Ames *v.* Belden, 17 Barb. 515; Kettle. *v.* Bromsall, Willes, 118; Parker *v.* Tiffany, 52 Ill. 286; Remick *v.* Atkinson, 11 N. H. 256; 35 Am. Dec. 493; Harrington *v.* Snyder, 3 Barb. 380; Vaughan *v.* Webster, 5 Harr. (Del.) 256.

3 Robinson *v.* Dunmore, 2 Bos. & P. 416. In Coggs *v.* Bernard, it was considered, notwithstanding Lord Coke's opinion to the contrary in Southcote's case, 4 Rep. 84, that in a gratuitous bailment, the promise of the defendant to lay the goods down *safely* introduced a special term into his contract which increased his liability.

4 Field *v.* Brackett, 56 Me. 121; McEvers *v.* The Sangamon, 22 Mo. 187; Singleton *v.* Carroll, 5 J. J. Marsh. 527; 22 Am. Dec. 95; Young *v.* Bruces, 5 Litt. 324; Reading *v.* Menkham, 1 M. & R. 234; Hyland *v.* Paul, 33 Barb. 241; Seevers *v.* Gabel, 62 N. W. Rep. 669 (Ia.) See Harvey *v.* Murray, 136 Mass. 377; Bellows *v.* Denison, 9 N. H. 293.

5 Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391; 27 Am. Rep. 660.

tised that it would keep an efficient police force on the grounds day and night to take care of articles exhibited. The plaintiff sent a gun to exhibit, which was stolen from the building where there was no guard kept, as promised. The association was held liable for the loss.[1] Where a bailee agreed to finish A's chattel in preference to all others, but went to work on B's before he had completed A's, and his factory and A's property were in the meantime burned, it was held that he was liable though the fire was not due to any negligence on his part.[2] Where A borrowed government bonds from B to use as collateral security for loans, promising to "return or account for the bonds," it was held, that A was liable to B, notwithstanding the bonds were stolen without his fault.[3] In a Massachusetts case a creditor received of a debtor a safe, and agreed in writing to deliver it to the debtor, "or its equivalent in money, on payment of a certain note." The debtor paid the note and demanded the safe, but it had been destroyed by fire without the creditor's fault. The latter was held liable.[4] Where the agreement was that the goods pledged should be stored in a certain

1 Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146; 52 Am. Rep. 687; 1 N. E. Rep. 382.

2 Pattison *v.* Wallace, 1 Stew. 48.

3 Archer *v.* Walker, 38 Ind. 472.

4 Drake *v.* White, 117 Mass. 10. "This," said the Court, "is a case of deposit of personal property by a debtor in the hands of a creditor as collateral security for the debt. If it presented merely the ordinary incidents of a pledge, it would be manifest that the action could not be maintained. The destruction of the property is conceded to have been accidental, without fault or neglect of duty on the part of the defendants. But the claim of the plaintiff is, that the transaction differs widely from an ordinary pledge, and he contends that by the terms of a written contract the defendants have taken upon themselves a special liability of a much more extensive character. If, in the common case of a pledge, the common-law contract were reduced to writing, it would contain, among other things, a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of such loss. In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendants' liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things: either to return the property specifically, or to pay for it in money.

warehouse and an agent of the pledgee removed them to another place, where they were injured, it was held that the pledgee was absolutely liable without regard to negligence.[1] So a warehouseman may enlarge his liability by agreeing to store goods in fire proof buildings.[2]

In the civil law what was called a valued loan, viz., where the goods lent are stated to be worth a certain price, made the borrower liable at all events to restore either them or the value so fixed. But the common law rule is different, viz., that the placing of a value or price upon the articles loaned does not enhance the obligation of the borrower, but serves merely to fix the amount of recovery in case of a loss for which the bailee is responsible.[3]

On the other hand, an ordinary bailee may stipulate for immunity from liability in case of damage or loss to the articles entrusted to him even though he may have been somewhat negligent in the matter. But no stipulation of the kind can do away with a bailee's lia-

There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. It is not difficult to suppose a case in which the parties might find it convenient that the business of guarding against the risk of fire or other accident should be attended to by the depositary. But however that may be, the proper interpretation of the contract is to be determined by the general rules of construction recognized by the law; and if the parties have improvidently made their contract more onerous than they expected, the difficulty cannot be removed by a violation of those rules."

1 St. Losky *v.* Davidson, 6 Cal. 644.

2 Hatchett *v.* Gibson, 13 Ala. 587; Gibson *v.* Hatchett, 24 Ala. 201; Vincent *v.* Rather, 31 Tex. 77: 98 Am. Dec. 516; Jones *v.* Hatchett, 14 Ala. 743. Where the owner of a warehouse in which plaintiff was about to store bulbs stated that it was free from frost, and that there was no danger of the bulbs freezing, this was held not enough to give plaintiff a right of action as on a warranty, the bulbs having frozen in the warehouse: Hallock *v.* Mallett, 55 N. Y. S. C. 265.

3 Edw. Bail. 174; Sir William Jones (Bail. 71) says: "If William says to Paul alternatively, 'I promise on my return to Oxford, either to restore your horse or to pay you thirty guineas, he must in all events perform one part of this disjunctive obligation;' but if Paul had only said, 'the horse which I lend you for this journey is fairly worth thirty guineas,' no more could be implied from these words than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that extraordinary diligence which the nature of the contract required."

bility in case the loss arises through his fraud,[1] and no contract between the parties will be binding if it is contrary to public policy, as contracts limiting the liability of common carriers for negligence are held to be.[2] The liability of a pledgee is restricted by an agreement between the parties that the pledgor and not the pledgee shall collect the securities pledged.[3]

§ 14. **Modification of Liability by Acts or Conduct of Bailor.**— Contributory negligence on the part of the bailor may bar his remedy. Illustrations of this principle are frequent in the succeeding chapters upon Carriers and Innkeepers;[4] but not a few may be discovered in the adjudged cases against ordinary bailees. Thus where a man hung his overcoat on a peg near the door instead of giving it into the custody of one of the defendant's servants whose business he knew was to take charge of customers' garments and it was stolen, it was held that the plaintiff himself was to blame and not the bailee,[5] and the same conclusion was reached where a person sent by another a check in a sealed envelope which check he had indorsed in blank.[6]

And in the selection of his bailee a man is required to exercise a certain amount of care. If one should entrust his watch to an idiot or a young child no amount of negligence on their part would give him a remedy against them; he would have to bear the consequences of his own stupidity.[7] So if a bailor knows not only the general character and habits of the bailee

1 Story Bail. § 32; Lancaster Co. Bank *v.* Smith, 62 Pa. St. 47; Smith *v.* Library Board, 59 N. E. Rep. 979 (Minn.)

2 See post § 137.

3 Lee *v.* Baldwin, 10 Ga. 208.

4 See post Cap. VIII *et seq.* See also Brandon *v.* Gulf City Mfg. Co., 51 Tex. 121.

5 Trowbridge *v.* Schreiver, 5 Daly 11.

6 Hayes *v.* Wells, 23 Cal. 185; 83 Am. Dec. 89.

7 "Although the character of the individual depositary can not be properly the subject of judicial investigation, cases do sometimes occur in which this seems to be necessary, in which his character in fact affects his liability.

or depositary, but the place where and the manner in which the goods deposited are to be kept by him, he must be presumed to assent in advance that his goods shall be thus treated; and if under such circumstances they are damaged or lost, it is by reason of his own fault or folly. He should not have intrusted them with such a depositary to be kept in such a manner and place.[1] So if the lender knows the borrower's character and how the thing loaned is to be used, it is no more than a fair inference that the lender agreed to require no greater care than the borrower is capable of bestowing.[2]

§ 15. **The Bailee's Special Property in the Chattel.**—He who has the title to a chattel has what is known in the law as the general property. The bailee not having the title, nevertheless has in addition to the possession of the chattel a special, limited or qualified property in it which gives him a right of action against any one, whether the bailor or a stranger, interfering with his possession or doing damage to the bailed article.[3] He is, in a certain sense the agent of

A man who knowingly entrusts his diamonds or other valuable property with a person of weak and infirm judgment, or to a child wanting experience and discretion, or to one of dissipated habits or crazy intellect, through whose infirmities the goods are lost or destroyed, it is fair to presume the depositor intended to take the reponsibility of all the chances."—Edw. Bail. 73, citing The William, 6 Rob. 316.

1 Knowles *v.* R. R. Co., 38 Me. 55; 61 Am. Dec. 234; Hayes *v.* Wells, 23 Cal. 185; 83 Am. Dec. 89. See Conway Bank *v.* American Express Co., 8 Allen, 512; Mooers *v.* Larry, 15 Gray, 451; Brown *v.* Hitchcock, 28 Vt. 452; Hughes *v.* Boyer, 9 Watts, 556.

2 Edw. Bail. 141.

3 Burdict *v.* Murray, 3 Vt. 302; 21 Am. Dec. 588; White *v.* Bascom, 28 Vt. 268; Hare *v.* Tuller, 7 Ala. 717; Cox *v.* Easley, 11 Ala. 362; Hopper *v.* Miller, 76 N. C. 402; Eaton *v.* Lynde, 15 Mass. 242; Shaw *v.* Kaler, 106 Mass. 448; Bradley *v.* Spofford, 23 N. H. 444; 55 Am. Dec. 205; Adams *v.* O'Connor, 100 Mass. 515; 1 Am. Rep. 137; Murray *v.* Warner, 55 N. H. 546; 20 Am. Rep. 227; McConnell *v.* Maxwell, 3 Blackf. 419; 26 Am. Dec. 428; Engel *v.* Scott, 61 N. W. Rep. 825 (Minn.); Shaw *v.* Kaler, 106 Mass. 448, the court saying: "It has been settled by a long course of decisions, that possession is a sufficient title to support an action of trespass or trover against a party having no right. A mere wrongdoer is not permitted to question the title of a person in the ac-

the bailor, charged with the execution of a trust connected with the custody of the property delivered to him; and in this capacity he is clothed with the rights necessary to the fulfillment of his duties under the trust.[1] In the early case of *Armory v. Delamirie*,[2] the plaintiff was a chimney-sweeper's boy, and found a jewel, which he carried to the defendant, a jeweler. The stones were taken out by the jeweler; and it was adjudged that the plaintiff was lawfully in possession against all the world, except the owner, and might maintain trover. The principle there established, viz., that the finder of a chattel, though he does not acquire by such finding an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner and consequently may maintain an action for it,[3] applies to all classes of bailees.[4]

tual possession and custody of the goods, whose possession he has disturbed: Armory *v.* Delamirie, 1 Strange, 505; Rogers *v.* Arnold, 12 Wend. 30, 37; Winship *v.* Neale, 10 Gray, 382; Burke *v.* Savage, 13 Allen, 408. In the action of trespass, as possession is *prima facie* evidence of right, so a mere stranger cannot deprive the party of that possession without showing some authority or right from the true owner to justify the taking. This sound and incontrovertible principle has been extended to trover, and it equally applies to replevin."

1 Edw. Bail. 34.

2 1 Strange, 505.

3 Brandon *v.* Huntsville Bank, 1 Stew. 320; 18 Am. Dec. 48; Armory *v.* Delamirie, 1 Strange, 505; 1 Smith's Lead. Cas. 636; McLaughlin *v.* Waite, 9 Cow. 670; 5 Wend. 404; 21 Am. Dec. 232; Pinkham *v.* Gear, 3 N. H. 484; Poole *v.* Symonds, 1 N. H. 290; 8 Am. Dec. 71; Clark *v.* Maloney, 3 Harr. (Del.) 63; Magee *v.* Scott, 9 Cush. 148; 55 Am. Dec. 49; Tatum *v.* Sharpless, 6 Phila. 18; Bridges *v.* Hawkesworth, 15 Jur. 1027. A finder may sue a gratuitous bailee with whom he has deposited the article for a negligent loss: Tancil *v.* Seaton, 28 Gratt. 601; 26 Am. Rep. 380.

4 Montgomery Gas Light Co. *v.* R. Co., 86 Ala. 372; Eaton *v.* Lynde, 15 Mass. 242; Harrington *v.* King, 121 Mass. 269; Eldridge *v.* Adams, 54 Barb. 417; Thayer *v.* Hutchinson, 13 Vt. 504; 37 Am. Dec. 607; Poole *v.* Symonds, 1 N. H. 290; 8 Am. Dec. 71; Hyde *v.* Noble, 13 N. H. 494; 38 Am. Dec. 508; Miller *v.* Adsit, 16 Wend. 335; Giles *v.* Grover, 6 Bligh, 277, 452; Carson *v.* Prater, 6 Cold. 565; Jones *v.* McNeil, 2 Bail. 466; Neff *v.* Thompson, 8 Barb. 213. See Ludden *v.* Leavitt, 9 Mass. 104; 6 Am. Dec. 45; Oucalt *v.* Durling, 25 N. J. (L.) 443; Cox. *v.* Easley, 11 Ala. 362; Hare *v.* Fuller, 7 Ala. 717; White *v.* Bascom, 22 Vt. 286; Bliss *v.* Schaub, 48 Barb. 339; Hopper *v.* Miller, 76 N. C. 402; McGill *v.* Monette, 37 Ala. 49; Woodman *v.* Nottingham, 49 N. H. 387; 6 Am. Rep. 526; Rindge *v.* Inhabitants, 11 Gray, 158; Philips *v.* Harriss, 3 J. J. Marsh. 122; 19 Am. Dec. 166; Little *v.* Fossett, 34 Me. 545; 56 Am. Dec. 671; Drake *v.* Redington, 9 N. H. 243; Brewster *v.* Warner, 136 Mass. 57; 49 Am. Rep. 5.

If the owner has bailed it for a specified time, the owner cannot during that time maintain trespass for it; for, until the bailment is at an end, he has parted both with the possession and right of possession.[1] But at the expiration of the time for which the thing has been bailed or where the bailment is at his will the owner may sue;[2] and so also if the bailee violates the terms of the bailment by his use of the chattel,[3] for he has then put an end to the bailment. A recovery by one bars the right in the other.[4]

§ 16. **Negligence Immaterial in Certain Cases.**— Where the bailment is in its inception tortious the question of negligence is immaterial, for the owner may recover his property or its value, as he may elect, and it is no defense that it has been destroyed or lost through no fault of the wrongdoer.[5] The strongest case of this kind would be that of a thief or trespasser; but the rule is not confined to cases where the defendant has taken possession of the owner's property without his consent, for every direct act of authority, amounting to an assertion of title, or denial of the bailor's right, every breach of the express or implied trust on which it was received, and every abuse of his possession, has been repeatedly

1 Bell *v.* Monahan, Dud. (S. C.) 38; 31 Am. Dec. 548; McFarland *v.* Smith, 1 Miss. 172; Lunt *v.* Brown, 13 Me. 236; Lacoste *v.* Pipkin, 13 Smedes & M. 589; Clark *v.* Carlton, 1 N. H. 110; Corfield *v.* Coryell, 4 Wash. C. C. 371; Lewis *v.* Carsow, 15 Pa. St. 31; Hume *v.* Tufts, 6 Blackf. 136; Wilson *v.* Martin, 40 N. H. 88; Putnam *v.* Wiley, 8 Johns. 432; 5 Am. Dec. 346; Muggridge *v.* Eveleth, 9 Met. 233; Swift *v.* Moseley, 10 Vt. 208; 33 Am. Dec. 197.

2 Keyes *v.* Howe, 18 Vt. 411; Orser *v.* Storms, 9 Cow. 687; 18 Am. Dec. 543.

3 Root *v.* Chandler, 10 Wend. 110; 25 Am. Dec. 546; Swift *v.* Moseley, 10 Vt. 208; 33 Am. Dec. 197; Clarke *v.* Poozer, 2 McMull. 434.

4 Howard *v.* Farr, 18 N. H. 457; Sallee *v.* Arnold, 32 Mo. 532; 82 Am. Dec. 144; Harrington *v.* King, 121 Mass. 269; Johnson *v.* Holyoke, 105 Mass. 80; Chesley *v.* St. Clair, 1 N. H. 189; Bissell *v.* Huntingdon, 2 N. H. 143.

5 Lucas *v.* Trumbull, 15 Gray, 306; Fisher *v.* Kyle, 27 Mich. 454; Cullen *v.* Lord, 39 Iowa, 302; Wentworth *v.* McDuffee, 48 N. H. 402; Kennedy *v.* Ashcroft, 4 Bush, 530; Collins *v.* Bennett, 46 N. Y. 490; Cothran *v.* Moore, 1 Ala. 423; Warner *v.* Dunnavan, 23 Ill. 380; Spencer *v.* Morgan, 5 Ind. 146; Smith *v.* Stewart, 5 Ind. 220; Alden *v.* Pearson, 3 Gray, 342.

held a conversion of the property, rendering the bailee from that time absolutely responsible for it, and casting upon him all the risks that may afterwards attend the property.[1]

Where the bailee has been guilty of an act of conversion a re-delivery of the articles bailed will not protect him from an action for the damages sustained by his misuse of the property while in his custody.[2] The acceptance of the property on its return in a damaged condition is not a waiver of the bailor's right of action for the damages.[3]

§ 17. **Bailee's Property Limited to the Trust.** Though the law gives the bailee an interest sufficient to carry out and accomplish the purposes of the contract, which extends to the defense of the property by action against any and all persons who may interfere with it,[4] yet this does not include the right to bestow it or make use of it in any way not evidently contemplated by the parties to the contract of bailment, and hence a bailee cannot sell the goods so as to give title to the vendee nor lease, pledge or otherwise transfer them in contravention of the purpose of the bailment even to one acting *bona fide* and without notice of the bailee's *status*,[5]

1 De Tollenere *v.* Fuller, 1 Mill Const. 117; 12 Am. Dec. 616; Duncan *v.* R. R. Co., 2 Rich. 213; Ulmer *v.* Ulmer, 2 Nott & McC. 489; Lane *v.* Cameron, 38 Wis. 603; Spencer *v.* Pilcher, 8 Leigh, 565; Hooks *v.* Smith, 18 Ala. 338; Mills *v.* Ashe, 16 Tex. 295; Harrington *v.* Snyder, 3 Barb. 380; Mayor *v.* Howard, 6 Ga. 213; Horsely *v.* Branch, 1 Humph. 199; Stewart *v.* Davis, 31 Ark. 518; 25 Am. Rep. 576; Green *v.* Hollingsworth, 5 Dana, 173; 30 Am. Dec. 688.

2 Reynolds *v.* Shuler, 5 Cow. 323.

3 Murray *v.* Burling, 10 John. 172; Baylies *v.* Fisher, 7 Bing. 153; Gibbs *v.* Chase, 10 Mass. 125; Bowman *v.* Teall, 23 Wend. 306; 35 Am. Dec. 562.

4 See *ante* § 15.

5 Story Bail. § 102; Emerson *v.* Fisk, 6 Greenl. 200; 19 Am. Dec. 206; Crimp *v.* Mitchell, 34 Miss. 449; Calhoun *v.* Thompson, 56 Ala. 160; 28 Am. Rep. 754; Medlin *v.* Wilkerson, 81 Ala. 147; Whitlock *v.* Heard, 13 Ala. 776; 48 Am. Dec. 73; Bryant *v.* Wardwell, 2 Ex. 479; Marner *v.* Banks, 16 Week. Rep. 62; Swift *v.* Moseley, 10 Vt. 208; 33 Am. Dec. 197; Johnson *v.* Wiley, 46 N. H. 75; Dunham *v.* Lee, 24 Vt. 432; Seargent *v.* Giles, 8 N. H. 325; Crocker *v.* Gullifer, 44 Me. 491; 69 Am. Dec. 168. A bailee has no right to lend

unless the bailor has acted in such a way as to lead the purchaser to believe the former was the owner.[1]

§ 18. **The Trust Duties of the Bailee.**—The bailee has agreed in accepting the bailed chattel to (a) receive it as his, the bailor's, to (b) obey the instructions of the bailor, to (c) use it in accordance with the terms of the bailment contract, and (d) to redeliver it to the bailor.

§ 19. (a) **To Hold of the Bailor.**—Holding the property by contract with the bailor, the bailee is not permitted to dispute the bailor's title, whether the bailment be a gratuitous one[2] or one for mutual benefit.[3] But it has been held that he may show that the bailor obtained possession of the goods fraudulently, tortiously or feloniously.[4] He does not stand, however, in any better conditon than the bailor; since the true owner may follow and take the property in whose hands soever it may be found. But until a demand is made or notice given, the bailee will be protected in the act of restoring the goods to the person from whom he received them.

the property, or impose a lien upon it as against the owner. Walker *v.* Wilkinson, 35 Ala. 725; 76 Am. Dec. 315; Small *v.* Robinson, 69 Me. 425; 31 Am. Rep. 799.

1 Smith *v.* Clews, 105 N. Y. 283; 11 N. E. Rep. 632; Sinclair *v.* Pearson, 7 N. H. 219; Kitchell *v.* Vanadar, 1 Blackf. 356; 12 Am. Dec. 249; Chism *v.* Woods, Hard. 531; 3 Am. Dec. 740; Russell *v.* Favier, 18 La. 585; 36 Am. Dec. 662. One buying wheat from a warehouseman who has no title buys at his peril. The true owner may maintain trover, and this, without a demand. Velsian *v.* Lewis, 15 Or. 539; 3 Am. St. Rep. 184; 16 Pac. Rep. 631.

2 Edwards on Bailments, § 73; Pulliam *v.* Burlingame, 81 Mo. 111; 51 Am. Rep. 229; Simpson *v.* Wrenn, 50 Ill. 222; 99 Am. Dec. 511; Nudd *v.* Montanyne, 38 Wis. 511; 20 Am. Rep. 25; Lain *v.* Gaither, 72 N. C. 234.

3 Canrice *v.* Spanton, 7 Man. & G. 903; Rogers *v.* Weir, 34 N. Y. 463; Maxwell *v.* Houston, 67 N. C. 305; Peebles *v.* Farrar, 73 N. C. 342; Foltz *v.* Stevens, 54 Ill. 180; Estes *v.* Boothe, 20 Ark. 583; Ball *v.* Liney, 48 N. Y. 6; 8 Am. Rep. 511; Gosling *v.* Birnie, 7 Bing. 339; Holl *v.* Griffin, 10 Bing. 246; Holbrook *v.* Wright, 24 Wend. 169; 35 Am. Dec. 607.

4 King *v.* Richards, 6 Whart. 418; 37 Am. Dec. 420; Humphrey *v.* Reed, 6 Whart. 443; Floyd *v.* Bovard, 6 Watts & S. 76; Hostler, *v.* Skull, Tayl. 152; 1 Am. Dec. 583.

§ 20. (b) **To Follow His Instructions.**—Any directions which a bailee receives from the bailor must be followed strictly, a deviation from them rendering him liable absolutely.[1] Thus, where a person puts grain in a warehouse for the purpose of storage, and the warehouseman converts the grain to his own use by manufacturing it into flour, and selling the flour, the owner of the grain may waive the tort, and recover from the warehouseman the sum he received for the flour, in an action for money had and received.[2] Where one hires a horse and buggy to go to a certain town and return and agrees to put the horse in a barn while at such town, but fails to do so, and the horse and buggy are stolen, he is liable to the owner for their value.[3] Where the hirer of mules substitutes some one else as driver instead of him who is placed in personal charge by the owner, he is guilty of conversion and liable for injuries they receive, whether negligently or not.[4] In a Massachusetts case[5] plaintiff, on going abroad, requested the defendant to buy a government bond and keep it for him. He did so, though he was to receive nothing for his services. After keeping it a year, without being requested, he sent it by mail to the plaintiff's wife, and it was lost. It was held that he was liable, without regard to the question of negligence. Said the court: "The substance of the defendant's contract and duty was to keep the deposit with reasonable care and to restore it when properly called upon. We do not interpret this contract as restricting him to one place or uniform mode of keeping. All that could reason-

1 Edw. Bail. 73; Parker *v.* Lombard, 100 Mass. 405; Compton *v.* Shaw, 1 Hun, 441; Howell *v.* Morlan, 78 Ill. 162; Kowing *v.* Manley, 49 N. Y. 192; 10 Am. Rep. 346. See Winkley *v.* Foye, 33 N. H. 171; 66 Am. Dec. 715.

2 Ives *v.* Hartley, 51 Ill. 520.

3 Line *v.* Mills, 39 N. E. Rep. 870 (Ind.).

4 Kellar *v.* Garth, 45 Mo. (App.) 332.

5 Jenkins *v.* Bacon, 111 Mass. 375; 15 Am. Rep. 333.

ably be expected of him was that he should keep it with his own papers and in the same manner and with the same degree of care as a man of ordinary prudence would exercise in the custody of papers of his own of like character. Circumstances might occur which would render it reasonable and proper that he should change the place of deposit. If his own place of business should be destroyed by fire, or if, from change of residence or temporary absence from the country, or for other sufficient reason, it should become inconvenient or unsafe that he should retain the manual possession of the bond, he would undoubtedly be at liberty to deposit it in any other place or mode in which he with reasonable prudence might deposit his own property of the like description. But, as between the original depositor and himself, he would continue to be the lawful and responsible custodian, and bound to practice that degree of care which the law required of gratuitous bailees. The complaint against him is, not that he kept it negligently or lost it by gross carelessness, but that he intentionally disposed of it in a manner not authorized by the terms of the trust. For the purposes of this case, it is wholly immaterial whether the post-office furnishes a reasonably safe mode of transmission in the case of valuable papers of such a description or not. The question of due negligence or gross neglect, in our opinion, is not raised by the bill of exceptions." So in Tennessee, T gratuitously undertook to receive fifteen hundred dollars for C at N, and to deliver it to him at W where they both resided. After drawing the money T went to a public fair, where he met E, a townsman, who was going home before he was. T, stepping a little aside from the crowd, gave E the money to carry to C. On his way home, while in a crowded car, E had his pocket picked of the money. It

was held that T was liable for the loss, as he had violated his trust and was guilty of a conversion of the property.[1] In an English case,[2] the defendant contracted to warehouse certain goods at a particular place, but he warehoused a part of them at another place, where, without negligence on his part, they were destroyed. The plaintiff had insured the goods, giving the place where the defendant contracted to warehouse them as the place where they were deposited, and in consequence lost the benefit of the insurance. It was held that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods. Grove, J., said, among other things: "I think the plaintiff is entitled to recover. It seems to me impossible to get over this point—that by the finding of the jury there has been a breach of contract. The defendant was intrusted with the goods for a particular purpose, and to keep them in a particular place. He took them to another, and must be responsible for what took place there. * * * I do not give any opinion whether what was done here amounted to a conversion, but I base my judgment on the fact that the defendant broke his contract by dealing with the subject-matter in a manner different from that in which he contracted to deal with it." Lindley, J., added: "It is further said that the defendant was responsible only for want of reasonable care; but is that so, when he has departed from his authority in dealing with the goods?" This case is distinguished in a Connecticut one[3] where the facts were as follows: B stored a hearse at A's livery stable. The hearse was insured, and one of the conditions of such insurance was that it should be kept at

1 Colyar *v.* Taylor, 1 Cold. 372.
2 Lilley *v.* Doubleday, 7 Q. B. Div. 510.
3 Bradley *v.* Cunningham, 23 Atl. Rep. 932.

this stable. A knew nothing of the insurance, nor did he contract to keep the hearse in any particular place. A few months after the hearse was left in his charge, A, without informing B, placed the hearse in another stable, where it was destroyed by fire. It was not claimed that its removal had increased the chances of loss or damage. The court held that A was guilty of no negligence for which B could recover, as it was B's duty to have informed A of the insurance and its conditions. The distinction between this and the English case is that in the latter the bailee had agreed to store in a particular place, while here he had not, and there being no breach of contract on his part, his removal of the chattel from one place to another equally safe place was not negligence on his part, neither was he bound to inquire whether the bailor had a policy of insurance upon it limited to the former place.[1]

§ 21. (c) **To Follow the Contract.**—A bailee must not use the property in a manner different from the intent of the contract.[2] The depositary has no right to use the thing bailed; and if he does he becomes liable absolutely for any injury or loss caused thereby.[3] This is the general rule, yet it is not universally applied—for:

1. The bailment may be made with the express intention that the thing shall be used by the bailee or the bailor may have given his consent to its use. In a loan, for use, for example, use of the thing is the very intention of the bailment.

2. The use of the thing may be necessary for the better keeping of the deposit. The bailee for example,

[1] A bailee for hire is not bound to insure: Story Bail. § 456.

[2] Crocker *v.* Gullifer, 44 Me. 491; 69 Am. Dec. 118.

[3] Story Bail. 98; Persch *v.* Quiggle 57 Pa. St. 240. Nor to lend it. *Id.*

may use moderately a horse left in his custody; may milk a cow left with him, or use the books of a friend in his charge, for in each case the use is not only not injurious to the property but may be necessary or useful to its preservation.[1]

On the other hand, if the things would be likely to be injured by use, the case would be different, and if they be locked up in a box or chest, or enclosed in a wrapper under seal, this circumstance would imply that they are not to be used; books, jewelry, plate or pictures deposited in this manner should be retained carefully in the condition in which they are received,[2] and it would be a great breach of duty on his part for him to break the seal or the lock except under circumstances of emergency.[3] If the bailee with the bailor's consent use the article to his own profit and advantage, the bailment will be changed from a gratuitous one to one for hire.

A loan is regarded as a personal favor and usually the thing must be used by the borrower alone and by no one else, not even his servant,[4] though it is said that if the loan be for a time certain, as of a horse for a week or a month, this gives to the borrower an interest in the horse during that time, which will authorize a general use, by himself or his servant; but if no time is specified, the law implies that a personal trust is reposed in the borrower that he alone shall use the chattel. The circumstances of the case or the language of the parties must always be examined into in order to show their intention with respect to the use of the chattel.

The use must be strictly confined to the time or object for which the loan is made, and if the loaned article

1 Edw. Bail. 89.
2 Story Bail. 90.
3 Schoul. Bail. 57; Herman *v.* Drinkwater, 1 Me. 27.
4 Story Bail. § 234; Bringloe *v.* Morrice, 1 Mod. 210.

be used differently, it is a breach of the trust under which it was loaned, and the borrower will be liable for an injury or loss, even by accident.[1] If a horse be lent to go to X, and he be driven towards Y, in another direction, or if he be borrowed for a week and kept for a month, the borrower becomes responsible for any casualties that may happen in the journey towards Y, or after the end of the week.[2] Sir William Jones[3] gives other examples: If George lent a masked habit and jewels to Charles, to be worn by him at a masked ball to be given on a future night; if on the way to or from the place where the ball is held the borrower be robbed of them at the usual time of going and returning, he will not be answerable for their value; but if he go from the ball to a gaming house with the jewels, he will be responsible if he lose them there by any casualty whatever. So, where silver utensils are lent to a man for the purpose of entertaining a party of friends at a dinner in the city, and he carries them into the country, the borrower will be responsible if the plate be lost by any accident whatever.

The hirer must confine himself to the use contemplated by the contract of hiring. If the thing hired is used for a different purpose from that which was intended by the parties, or in a different manner,[4] or for a longer period, the hirer is not only responsible for all damages, but if a loss afterwards occurs, although by inevitable

1 Martin *v.* Cuthbertson, 64 N. C. 828; Buchanan *v.* Smith, 10 Hun, 474; Lane *v.* Cameron, 38 Wis. 603; Cullen *v.* Lord, 39 Iowa, 302; Stewart *v.* Davis, 31 Ark. 518; 25 Am. Rep. 576; Kennedy *v.* Ashcroft, 4 Bush, 530; Cramp *v.* Mitchell, 34 Miss. 449; De Tollenere *v.* Fuller, 1 Mill Const. 517; 12 Am. Dec. 616.

2 Story Bail. § 232; Cullen *v.* Lord, 39 Ia. 302.

3 Bail. 69.

4 Thus it has been held that the bailor of a mare may maintain trover against the bailee for willful immoderately fast driving, seriously endangering her life, for outside his liability for negligence this is a misuse of the property bailed: Wentworth *v.* McDuffie, 48 N. H. 402.

casualty, he will generally be responsible therefor.[1] There is on the part of the hirer, an implied obligation, not only to use the thing hired with due care and moderation, but also not to apply it to any other use, nor beyond the time for which it was hired. We have already seen that in all bailments it is a misuser of bailed chattels to appropriate them to a purpose different from that which was intended by the parties, or to use them in a different manner, or to detain them for a longer period than that agreed upon; and such a misuser, at common law, is deemed a conversion of the property, for which the hirer is held responsible to the letter to the full extent of his loss.[2] Where there is no agreement as to the manner in which a hired chattel shall be used, the presumption and implied agreement between the parties is, that it shall be used in the ordinary manner, and for the purposes to which it is naturally fitted. Thus, if a horse is hired as a saddle horse, the hirer has no right to use him in a cart, or to carry loads, or as a beast of burden. So, on a contract for the hire of a vehicle usually employed to carry two persons, both parties being silent as to the number of persons who are to be permitted to ride in it, the hirer is authorized to carry such a number as the carriage was made for.[3] A general hiring of a horse and carriage

1 Fisher *v.* Kyle, 27 Mich. 454; Wentworth *v.* McDuffie, 48 N. H. 402; Ray *v.* Tubbs, 50 Vt. 688; 27 Am. Rep. 519; Lane *v.* Cameron, 38 Wis. 603; Lucas *v.* Trumbull, 15 Gray, 309; Buchanan *v.* Smith, 10 Hun, 474; Wheelock *v.* Wheelwright, 5 Mass. 104; Homer *v.* Thwing, 3 Pick, 492; Stewart *v.* Davis, 31 Ark. 518; 25 Am. Rep. 576; Gorman *v.* Campbell, 14 Ga. 137; Duncan *v.* R. R. Co., 2 Rich. 613; Robinson *v.* Parnell, 15 Tex. 382; Butler *v.* Walker, Rice, 182; Lewis *v.* McAfee, 32 Ga. 465; McNeill *v.* Brooks, 1 Yerg. 75; Schenck *v.* Strong, 4 N. J. L. 87; Rotch *v.* Hawes, 12 Pick. 136; 22 Am. Dec. 414; Malone *v.* Robinson, 77 Ga. 719; Malaney *v.* Taft, 60 Vt. 571; 6 Am. St. Rep. 135; 15 Atl. Rep. 326.

2 In the days of slavery the hiring of a slave was a bailment, but when a slave was hired to do one kind of work and was injured while doing another kind, the hirer was regarded as absolutely liable for any injury to him while so employed. See Sims *v.* Chance, 7 Tex. 561; Hooks *v.* Smith, 18 Ala. 388; Mayor *v.* Howard, 6 Ga. 213.

3 Edw. Bail. 328.

from a livery stable would give authority to use it in driving in any direction and to any place where persons are in the habit of driving, and for a reasonable time. But if a horse is hired to be driven a specified distance and it is driven further,[1] or to a specified place and it is taken to another place,[2] the bailee is responsible though the horse is injured without his fault.

In all these cases the reason of the law is that if it had not been used otherwise than it was lent or hired to be, the accident would probably not have befallen it, and that by exceeding the authority given him the borrower or hirer disaffirms the contract and exercises an act of ownership over the property inconsistent with the rights of the bailor.

And in all bailments, to use, or keep, or do work upon a thing, the contract, as we have seen, gives the bailee no right to sell it, though a bailee for hire may transfer his interest in the property.[3]

§ 22. (d) **To Re-deliver the Thing.**— The bailee must restore the chattel to the bailor at the end of the term,[4] for a refusal to deliver on demand, or at the time and place stipulated, is evidence of a conversion of the

1 Wheelock *v.* Wheelright, 5 Mass. 104; Frost *v.* Plumb, 40 Conn. 14; Rotch *v.* Hawes, 12 Pick. 135; 22 Am. Dec. 414; Fisher *v.* Kyle, 27 Mich. 454; Woodman *v.* Hubbard, 25 N. H. 67; 57 Am. Dec. 310; Lucas *v.* Turnbull, 15 Gray, 306; Murphy *v.* Kauffman, 20 La. Am. 559.

2 Hart *v.* Skinner, 16 Vt. 138; 42 Am. Dec. 500; Ray *v.* Tubbs, 50 Vt. 688; 28 Am. Rep. 519; Martin *v.* Cuthbertson, 64 N. C. 328; Homer *v.* Thwing, 3 Pick. 492. It is held in Massachusetts that where one hires a horse to drive to a particular place, and in returning unintentionally takes the wrong road, and after traveling on such road a few miles discovers his mistake, and takes what he considers the best way back to the place of hiring, which is by a circuit through another town, he is not liable to trover for the conversion of the horse: Spooner *v.* Manchester, 133 Mass. 270; 43 Am. Rep. 514.

3 Bailey *v.* Colby, 34 N. H. 29; 66 Am. Dec. 752; Nash *v.* Mosher, 19 Wend. 431; Vincent *v.* Cornell, 13 Pick. 294; 23 Am. Dec. 683.

4 Schoul. on Bail. 154; Lay *v.* Lawson, 23 Ala. 377; Bailey *v.* Colby, 34 N. H. 29; 66 Am. Dec. 752; Hurd *v.* West, 7 Cow. 752; Pribble *v.* Kent, 10 Ind. 325; 71 Am. Dec. 327; Willmer *v.* Morrell, 40 N. Y. (S. C.) 222; Long Island Brewery Co. *v.* Fitzpatrick, 18 Hun, 389; Simpson *v.* Wrenn, 50 Ill. 222; 99 Am. Dec. 511; Barnard *v.* Kobbe, 3 Daly, 35; Maxwell *v.* Houston, 67 N. C. 305; Dodge *v.* Meyer, 61 Cal. 405; Estes *v.* Boothe, 20 Ark. 583; South. Australian Ins. Co. *v.* Randell, L. R. 3 P. C. 101.

property, which will render the bailee liable for its value.[1]

The duty to re-deliver is absolute, if it is within the power of the bailee. Hence, if a bailee deliver the property to one whom he mistakingly thinks was the owner, he is liable without regard to the question of due care or degree of negligence.[2] Negligence is always relevant where the issue is as to whether the bailee has kept the property as he should, but not where having it in his hands he has made re-delivery to another than the bailor, and the bailee is responsible, therefore, if he by mistake deliver the things bailed to the wrong person; and a forged order for them will not protect him.[3]

Property may be demanded of a bailee wherever he may be at the time, and although he is not bound to deliver it at that place. If the bailee answers that he is ready to deliver at the proper place, there will be no breach of his duty; but if he deny the right of the bailor, and refuse to deliver the property at all, there is no use in making another demand, and the bailee will be answerable in the proper action.[4]

1 Story Bail. § 122; Vaughan *v.* Webster, 5 Harr. (Del.) 256; Winkley *v.* Foye, 33 N. H. 171; 66 Am. Dec. 715; Roulston *v.* McClelland, 2 E. D. Smith, 60; Wilson *v.* R. Co., 62 Cal. 164; Bush *v.* Miller, 13 Barb. 481.

2 Jenkins *v.* Bacon, 111 Mass. 373; 15 Am. Rep. 33; Lancaster Co. Bk. *v.* Smith, 62 Pa. St. 47; Stewart *v.* Frazier, 5 Ala. 114; Ganley *v.* Troy City Bk. 98 N. Y. 487; Bank of Oswego *v.* Doyle, 91 N. Y. 32; 43 Am. Rep. 634; Jeffersonville R. R. Co. *v.* White, 6 Bush, 251; Alabama, etc. R. R. Co. *v.* Kidd, 35 Ala. 209; Willard *v.* Bridge, 4 Barb. 361; Dufour v. Mefham, 31 Mo. 577; Graves *v.* Smith, 14 Wis. 5; 80 Am. Dec. 762. An owner of a bath house, who gives a check to a bather for valuables left in his custody, and, knowing well both the bather and the valuables, gives the valuables to another person on presentation of the check, is liable for their value: Tombler *v.* Koelling, 28 S. W. Rep. 795 (Ark.)

3 Parker *v.* Lombard, 100 Mass. 405; McGinn *v.* Butler, 31 Iowa, 160; Dufour *v.* Mefham, 31 Mo. 577; Stevenson *v.* Price, 30 Tex. 715; Willard *v.* Bridge, 4 Barb. 361; Collins *v.* Burns, 63 N. H. 1; Alabama, etc. R. R. Co. *v.* Kidd, 35 Ala. 209; Jeffersonville, etc. R. R. Co., *v.* White, 6 Bush, 251; Lichtenhein *v.* R. R. Co., 11 Cush. 70; Forsythe *v.* Walker, 9 Pa. St. 140; Hall *v.* R. R. Co., 14 Allen, 439; 92 Am. Dec. 783; Kowing *v.* Manley, 49 N. Y. 192; 10 Am. Rep. 346.

4 Dunlap *v.* Hunting, 2 Denio. 643; 43 Am. Dec, 763; Scott *v.* Crane, 1 Cow. 255; Higgins *v.* Emmons, 5 Conn. 76; 13 Am. Dec. 41; Slingerland *v.* Morse, 8 Johns. 474; Mason *v.* Briggs, 16 Mass. 453; 2 Kent's Com. 508.

In a loan for use, there is always an implied agreement to re-deliver the thing loaned as soon as the time has expired for which the loan was made; or if no time was specified, within a reasonable time after the purpose of the loan has been accomplished. While the depositary may retain them until a demand is made for them;[1] and a mandatary is not to be presumed in fault until after he has been called upon for the property intrusted to him;[2] the borrower must return the loan within the time limited, and an action lies against him if he fail to do so without any previous demand.[3]

If the time is fixed by agreement or by the nature of the object to be accomplished, a bailee must return the property at that time; if not so fixed, whenever called upon, after a reasonable time.[4]

If no place is specified for their delivery, the chattels are deliverable at the place where they were received, and the bailee cannot be required to produce them at any other place, unless he has voluntarily stipulated to do so.[5] As in other cases, the express terms of the contract itself regulates the place and mode of the re-delivery, and the time or event on the occurrence of which it is to be made; the bailor cannot recover them until they have been properly demanded according to the contract; neither can he require their delivery at any other place or time than that specified.[6] The borrower must return them to the lender, ordinarily at the place from which he received them; but the lender may desig-

1 Brown *v.* Cook, 9 Johns. 361.

2 Beardsley *v.* Richardson, 11 Wend. 25.

3 Story Bail. 257; Clapp *v.* Nelson, 12 Tex. 370; 62 Am. Dec. 530; Green *v.* Hollingsworth, 5 Dana, 175; 30 Am. Dec. 680. But if no time is fixed a demand is usually required: Clapp *v.* Nelson, *ante;* Gilbert *v.* Manchester Co., 11 Wend. 625.

4 Cobb *v.* Wallace, 5 Cold. 539; 98 Am. Dec. 435.

5 Brown *v.* Cook, 9 Johns. 361; Mason *v.* Briggs, 16 Mass. 453; 2 Kent Com. 508.

6 Carle *v.* Bearce, 33 Me. 337; Esmay *v.* Fanning, 9 Barb. 176.

nate the place where they shall be received. The borrower, no place being appointed for the delivery, must, it seems, seek the lender and learn at what place he will receive them.[1]

But the place where they are to be restored is always determined with reference to the nature of the thing to be re-delivered, and the relative situation and circumstances of the parties to the contract of bailment.

§ 23. **Excuses for Non-Delivery.**—The bailee may, however, show: 1. That the thing has been taken out of his hands at the suit of one having a paramount title.[2]

2. That he had delivered it to the true owner on demand (for this he could not refuse without being subject to an action by him[3]), or has been notified by the true owner not to deliver to the bailor.[4] To avoid the inconvenience of a double litigation, where there are rival claimants to the property, and an action is brought against the bailee for its detention, a convenient remedy is furnished in courts of equity by a bill of interpleader, which may be filed where the plaintiff stands in the situation of an innocent stakeholder, against defendants claiming of him the property, fund or duty, by different or separate interests.[5] The bill of interpleader shows: 1. That two or more persons have preferred a claim against the complainant; 2. That they claim the same thing; 3. That the complainant has no beneficial interest in the thing claimed; and 4. That

1 Esmay *v.* Fanning, 9 Barb. 176; 5 How. Pr. 228; Rutgers *v.* Lucet, 2 Johns. Cos. 92.

2 Kelly *v.* Patchell, 5 W. Va. 585; Cook *v.* Holt, 48 N. Y. 275; Edson *v.* Weston, 7 Cow. 278; Benton *v.* Wilkinson, 18 Vt. 186; 46 Am. Dec. 145.

3 Doty *v.* Hawkins, 6 N. H. 247; 25 Am. Dec. 459; Bates *v.* Stanton, 1 Duer, 79; Hurd *v.* West, 7 Cow. 752; Story Bail. § § 102, 103; Stephens *v.* Vaughan, 4 J. J. Marsh, 206; 20 Am. Dec. 216; Roberts *v.* Yarboro, 41 Tex. 449.

4 Kelly *v.* Patchell, 5 W. Va. 585; Carroll *v.* Mix. 51 Barb. 212.

5 Edw. Bail. 84; Ball *v.* Liney, 48 N. Y. 6; 8 Am. Rep. 511.

he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs.[1]

3. That they have been destroyed or lost while in his hands without his fault.

§ 24. **The Duties of the Bailor.**—The duties of the bailor are to conform on his part to the obligations of the bailment contract. In the case of a bailment for a term or purpose founded on a consideration he must allow the bailee the free and exclusive use of the chattel during that time and must not molest him except for cause.[2] And he must likewise see to it that the bailee suffers no injury through his act. Even a lender must not lend a defective or dangerous thing which he knows to be so,[3] without notifying the borrower; "for even a gratuitous lending should be to confer a benefit, not to do a mischief."[4] But though a livery man who negligently furnishes an unsuitable horse cannot show as an excuse that he did not know it was so,[5] yet a liveryman who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care; and, where a hirer is injured through such defects, the liveryman is not liable.[6]

[1] Atkinson *v.* Manks, 1 Cow. 703. The fact that an adverse claim is made to the property does not entitle a warehouseman to require a bond of indemnity from the true owner as a condition of delivering the property. The remedy is by an interpleader: Banfield *v.* Haeger, 7 Abb. N. C. 318; 45 N. Y. (S. C.) 428.

[2] Hickok *v.* Buck, 22 Vt. 149; Hartford *v.* Johnson 11 N. H. 145.

[3] McCarthy *v.* Young, 6 H. & N. 329.

[4] Schoul. Bail. 86; Blakemore *v.* R. Co. 8 El. & Bl. 1035.

[5] Horne *v.* Meakin, 115 Mass. 326; Wendle *v.* Jordan, 75 Me. 140.

[6] Hadley *v.* Cross, 34 Vt. 586; 80 Am. Dec. 699; Copeland *v.* Draper, 32 N. E. Rep. 944 (Mass.) the court saying, "In the case at bar, negligence was excluded by the plaintiff's admission that there was no evidence that the defendant knew, or by the exercise of reasonable care could have known, that the horse was unsuitable, if in fact it was. Therefore, in order to recover, the plaintiff must maintain that a livery stable keeper warrants or insures the suitableness of every horse which he lets. No such liability is imposed on him by the fact that he follows a common calling,

If the owner knows the thing is defective, the hirer may return it as soon as he discovers the defect, and is not liable to pay for its use,[1] but may recover such expense as he has been put to, from the owner.[2]

The bailor is not liable for the act of the bailee in so using the loaned chattel as to do injury to third persons.[3]

Another duty of the bailor is in regard to:

§ 25. **Compensation and Reimbursement.**—The bailee for hire is entitled to compensation for his services. This, if not a matter of express contract as to amount, must be regulated by the usual price paid for

any more than it is upon every man who keeps a shop. Even in old times, the exercise of a common calling only required a man to show skill in his business. Fitzh. Nat. Brev. 94, D; Norris *v.* Staps, Hob. 210*b*, 211; 3 Bl. Comm. 164; Rex *v.* Kilderby, 1 W. Saund. 311, 312, note 2. Common carriers were insurers, not because they had a common calling, but because they were bailees, coupled with certain gradual changes in the law, not material here. If it should be sought to charge the defendant for the horse as for a dangerous animal, the liability for a horse on that ground, apart from bailment, is confined to cases where the owner has notice of the dangerous tendency: Com. *v.* Pierce, 138 Mass. 165, 179; Dickson *v.* McCoy, 39 N. Y. 400, 403. See also Hawks *v.* Locke, 139 Mass. 205, 208, 1 N. E. Rep. 543. The suggestion has been made, following Mr. Justice Story's statement of the doctrine of Pothier, that bailors for hire generally warrant the suitableness of the thing let, (Harrington *v.* Snyder, 3 Barb. 380, 381; Story Bail. § § 383, 390;) but the common law in general applies the principle of *caveat emptor* when the hirer has examined the article, (Cutter *v.* Hamlen, 147 Mass. 471, 475, 18 N. E. Rep. 397. See, further, Hawks *v.* Locke, *supra;* McCarthy *v.* Young, 6 H. & N. 329.) The supposed warranty, if it existed, could not be placed on any of the foregoing considerations, but would have to stand on the analogy of carriers of passengers, taking their liability in the strictest form in which it ever has been taken. There have been intimations, if not decisions, in favor of such a view with regard to vehicles let for the known purpose of carrying passengers, (Jones *v.* Page, 15 L. T. (N. S.) 619; Leach *v.* French, 69 Me. 389, 392; Harrington *v.* Snyder, 3 Barb. 380; Kissam *v.* Jones, 56 Hun, 432, 434; 10 N. Y. Supp. 94. Compare Francis *v.* Cockrell, L. R. 5 Q. B. 501, 503; Fowler *v.* Lock, L. R. 7 C. P. 272, L. R. 9 C. P. 751, note, L. R. 10 C. P, 90;) but an opposite decision was reached in Hadley *v.* Cross, 34 Vt. 586, and in this commonwealth even carriers of passengers do not warrant their vehicles, and are not liable if wholly free from negligence, (Ingalls *v.* Bills, 9 Metc. (Mass.) 1; White *v.* Railroad Co., 136 Mass. 321, 324; Readhead *v.* R. Co., L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.) It follows, *a fortiori,* that one who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care. See Story Bail. § 391*a*; Edw. Bail. § 373."

1 Reading *v.* Price, 3 J. J. Marsh, 61; 19 Am. Dec. 162.

2 Harrington *v.* Snyder, 3 Barb. 380; Parker *v.* Marquis, 64 Mo. 38.

3 Herlihy *v.* Smith, 116 Mass. 265.

similar services under the same circumstances. And it is to be remembered that though nothing is said about payment, the law implies a promise to pay for services rendered upon request, unless it appears that there is an understanding that no compensation shall be rendered.[1]

If through no fault of his, the chattel is destroyed so that he is unable to complete the service, the modern doctrine is that he may recover for what he has done up to that time; though, if he wilfully refuse to complete or the destruction is through his neglect, he loses the value of his services upon it.[2] But the numerous questions relative to the bailee's recovery for his labor or services belong to the Law of Contract generally, and have already been discussed in my previous work.[3]

In a hiring of chattels, where there has been a partial use of the things bailed and then a total loss of them without fault on the part of the bailee, a compensation is allowed *pro tanto*.[4] The common law rule that when a tenant leases real estate for a term, he must pay the rent for that term, notwithstanding the building which alone rendered it valuable is destroyed by fire, is not applicable to a bailment of chattels, because the tenant acquires a perfect right over the real estate so hired for his entire term; the consideration for his covenant to pay rent is modified by such a casualty as fire, but it is not wholly destroyed, as it is in the case of the destruction of a chattel hired for a term.[5]

Ordinary expenses are to be borne by the hirer for use; unless the manner and circumstances of the con-

1 Laws. Contr. § 38.

2 See Laws. Contr. §§ 467, 470; Schoul. Bail. 113; McConihe *v.* R. Co., 20 N. Y. 495; 75 Am. Dec. 420.

3 See my treatise on the principles of the American Law of Contracts published in 1893.

4 Edw. Bail.; Young *v.* Bruce, 5 Litt. 324; Collins *v.* Woodruff, 4 Ark. 463.

5 Edw. Bail. 337.

tract be such as to imply a different agreement. If the chattels be hired for a length of time, the inference would seem to be that the hirer undertakes to keep the things in ordinary repair as he would his own property.[1] But extraordinary expenses must be borne by the owner and not the hirer.[2] Thus, if a hired horse is taken sick on a journey, without the fault of the hirer, the expenses which are *bona fide* incurred for his medicine, nourishment and care, during his sickness, are to be borne by the owner, whether the horse recovers or dies of the malady.[3]

The lender must reimburse the borrower for extraordinary expenses occasioned in preserving the chattel.[4] By this is not meant the ordinary expense of keeping the thing loaned, which must always be borne by the borrower, but an expense not contemplated by the parties at the time the loan was made, and which is essential to the preservation of the thing. But the authority to create such a charge is implied to the borrower in those cases only where the case is so urgent that the lender cannot be notified of the necessity in time to decide in the matter himself.[5]

In the case of gratuitous bailments, though the bailee cannot ask for compensation, yet the bailor must reimburse him the money he has advanced for the safe keeping of the thing, and indemnify him for all it has cost him. He must also indemnify the depositary for the

1 Story Bail. § 388. A bailee has authority to bind the bailor by a contract for the preservation and care of the property in his possession, even though the bailee is liable in such case upon a particular contract: Harter *v.* Blanchard, 64 Barb. 617. The hirer of a horse is bound to supply it with food: Handford *v.* Palmer, 5 Moore, 74; 3 Ball & B. 359.

2 Leach *v.* French, 69 Me. 398; 31 Am. Rep. 296.

3 *Id.*

4 Schoul. Bail. § 86.

5 Edw. Bail. 163.

losses which the thing deposited may have occasioned him.[1]

If the mandator gives his goods to the bailee with a view to having something done to them, in the process of which the bailee must necessarily incur expense, he is bound to reimburse him; "for it can never be presumed that a gratuitous trust is designed to be a burden on the mandatory."[2] If, however, the expenses have been incurred wantonly, if they were unnecessary or in excess of what was necessary, if the necessity for the outlay arose from the gross negligence of the bailee—from his fraud, or from an unwarranted departure from the duties imposed by the terms of the bailment—they are not reimbursable.

"If," says Mr. Browne, "the proximate cause of the injury can be directly traced to the execution of the trust, then, by the civil law, the mandator was liable to the mandatary. If, however, the execution of the mandate was only the occasion of the injuries suffered by the mandatary, then the bailor was not liable."[3] If, for example, A asks B to take some money for him from Chicago to New York, and on the way B is robbed of his own money as well as his friend's, A is not liable for B's loss. But if he asks B to carry his money through a country infested with robbers, A would be liable, for in the first case the mandate was only the occasion for the loss, while in the latter it was the cause.

1 Preston *v.* Neale, 12 Gray, 222; Reeder *v.* Anderson, 4 Dana, 193; Harter *v.* Blanchard, 64 Barb. 617; Dale *v.* Brinckerhoff, 7 Daly, 45. But at common law there is no lien for such charges: Preston *v.* Neale, 12 Gray, 222; Revara *v.* Ghio, 3 E. D. Smith, 264; see *post.* § 27. If the bailee comes into the possession of the property by finding, and the owner offers a reward for the restoration of it to him, the reward becomes a lien on the property: Laws. Rights, Rem. & Pr. § 1719.

2 Browne Carr, § 31; Story Bail. § 197.

3 Browne Carr, § 31, citing Story Bail. § 200.

§ 26. **The Lien Upon a Chattel for Services.**— A lien at common law is a right to retain possession of property belonging to another until a claim of the party in possession against the owner is satisfied, and it arises by operation of law without any agreement of the parties.[1] Liens are of two kinds, *particular* and *general*. A particular lien (called also a specific lien), attaches only to the particular chattels for work done upon or in connection with them. A general lien attaches to all goods in the possession of the individual in whom the right is vested, and that for claims or demands which need not necessarily arise in relation to the goods retained, but for general claims upon transactions of a nature analogous to that which brought the specific goods retained into the possession of the person exercising the right.[2] Grave doubts have been entertained as to the advisability of the existence of a general lien; it has been regarded with much jealousy by courts of law,[3] and will not be allowed in the absence of an express agreement between the parties, or clear evidence of a settled and uniform custom in the particular trade or business.[4] Thus, one tendered payment for work on a specific article, cannot claim a lien upon it for charges for work on other articles belonging to the same owner,[5] unless the contract was for a gross sum to be paid for the work done on all.[6]

The bailee may enforce his lien against creditors of the owner, as well as against the owner himself,[7] or against one who has permitted the bailor to have possession of the article,[8] but not against an owner who

1 Lawson Rights, Rem. & Pr. §3093.

2 Browne Carr, § 42; Meyer *v.* Jacobs, 1 Daly 32.

3 Rushforth *v.* Hadfield, 7 East.

4 Edw. Bail. § 308; Moulton *v.* Greene, 10 R. I. 330.

5 Moulton *v.* Greene, 10 R. I. 330.

6 Hensel *v.* Noble, 95 Pa. St. 345; 40 Am. Rep. 659.

7 Moore *v.* Hitchcock, 4 Wend. 292; Rucker *v.* Donovan, 13 Kas. 251.

8 White v. Smith, 44 N. J. (S.) 105; 43 Am. Rep. 34.

has had the thing taken from him without his consent.[1] And as it is accessory to the right of compensation for the services, it is defeated by whatever defeats that claim.[2]

It is the very essence of the lien, that the person claiming it has the possession of the chattel upon which the lien is claimed to operate.[3] By surrendering the property, he divests himself of his lien;[4] for his lien is not an estate or interest in the thing; the property being still in the bailor, it is neither a *jus ad rem*, nor a *jus in re*, but a simple right to retain the thing till the lien thereon be discharged.[5] At common law there is no lien for work done or materials furnished in building a house, or other edifice, upon real estate owned by another, because the bailee loses possession of the thing as it becomes immediately attached to the soil and a part of the premises; nor had an employe or workman of a contractor in any case, for the possession, if any, was that of the master.[6] But under the statutes of many of the States, such a lien is given for the value of the labor and materials furnished and bestowed in the repair and erection of buildings, or for the value of the labor of me-

1 Sargent *v.* Usher, 55 N. H. 287; Hollingsworth v. Dow, 19 Pick. 228; Lowe *v.* Woods, 34 Pac. Rep. 959 (Cal.).

2 Edw. Bail. 386.

3 Edw. Bail. 308; McIntyre *v.* Carver, 2 W. & S. 392; 37 Am. Dec. 519; Hollingsworth *v.* Dow, 19 Pick. 228; Wright *v.* Terry, 23 Fla. 100; 2 South. Rep. 6; Stillings *v.* Gibson, 63 N. H. 1; Jenkins *v.* Eichelberger, 4 Watts, 121; 28 Am. Dec. 691; Jordan *v.* James, 5 Ohio 88; Reineman *v.* R. Co. 51 Iowa 338.

4 Jones *v.* Pearle, Str. 556; 1 East 4; Oakes *v.* Moore, 24 Me. 214; 41 Am. Dec. 379; Miller *v.* Marston, 35 Me. 153; 56 Am. Dec. 694; Bigelow *v.* Heaton, 4 Denio. 496; Sears *v.* Wills, 4 Allen 212; Bailey *v.* Quint, 22 Vt. 474.

5 Meany *v.* Head, 1 Mason, 319; Sensenbrenner *v.* Matthews, 48 Wis. 250; 33 Am. Rep. 809; 3 N. W. Rep. 599; Smith *v.* Greenup, 60 Mich. 61; Ames *v.* Palmer, 42 Me. 197; 66 Am. Dec. 271. *Aliter* where possession is obtained by the bailor without the bailee's consent. Partridge *v.* Dartmouth College, 5 N. H. 286; or through fraud. Manning *v.* Hollenbeck, 27 Wis. 202; Bigelow *v.* Heaton, 16 Hill 43; 4 Denio. 496.

6 Edw. Bail. 386; McIntyre *v.* Carver, 2 W. & S. 392; 37 Am. Dec. 579; Hollingsworth *v.* Dow., 19 Pick 228; Wright *v.* Terry, 23 Fla. 160; 2 South. Rep. 6; King *v.* Indian Orchard Canal Co., 11 Cush. 231.

chanics employed by a contractor, to the extent of the owner and employer's interest in the premises. In order to perfect this lien, it is necessary to follow strictly the provisions of the statute authorizing it.[1]

The lien exists equally, whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price, unless there be a future time of payment fixed. In that case the special agreement is inconsistent with the right of lien, and destroys it.[2]

The lien is defeated by the tender to the bailee of his proper charges, or by the bailee when demand is made upon him for the goods, placing his refusal to make delivery upon a ground other than that of nonpayment of the charges.[3] The bailee, during the time he retains the goods for his charge, remains a bailee for hire, charged with the duty of preserving them with reasonable care.[4]

The bailee's lien upon the goods does not clothe him with power to sell them for the satisfaction of his charges;[5] his remedy to enforce his lien is by an action in the nature of a bill in equity.[6] The right is simply

1 1 Stim. Am. St. L. 1960 *et seq.*

2 Hutchins *v.* Olcott, 4 Vt. 549; 24 Am. Dec. 634; Mathews *v.* Sellers, 86 Pa. St. 486; 27 Am. Rep. 723; Hanna *v.* Phelps, 7 Ind. 21; 63 Am. Dec. 410; Cumming *v.* Harris, 3 Vt. 244; Burdick *v.* Murray, 3 Vt. 302; Woolen Manfg. Co. *v.* Huntley, 8 N. H. 441; Trust *v.* Pirsson, 1 Hilt. 292; Wiles Laundering Co. *v.* Hahlo, 105 N. Y. 234; 59 Am. Rep. 496; 11 N. E. Rep. 500; Pinney *v.* Wells, 10 Conn. 104; Chandler *v.* Belden, 18 Johns 157; 9 Am. Dec. 193; Hale *v.* Barrett, 26 Ill. 195; 79 Am. Dec. 367.

3 Saltus *v.* Everett, 20 Wend. 267; Everett *v.* Coffin, 6 Wend. 608; Holbrook *v.* Wight, 24 Wend. 169; Bean *v.* Bolton, 3 Phila. 87; Picquet *v.* McKay, 2 Blackf. 465; Hanna *v.* Phelps, 7 Ind. 21; 63 Am. Dec. 410; Dows. *v.* Morwood, 10 Barb. 183; Thatcher *v.* Harlan, 2 Houst. 178; Hamilton *v.* McLaughlin, 145 Mass. 20; 12 N. E. Rep. 424.

4 St. Louis & R. Co. *v.* Flanagan, 23 Ill. (App.) 489.

5 Pothonier *v.* Dawson, Holt N. P. 387; Rankin *v.* Packet Co., 9 Heisk. 564; Case *v.* Fogg, 43 Mo. 44; Chandler *v.* Belden, 18 Johns 157; Hickman v. Thomas, 16 Ala. 666; Hunt *v.* Haskell, 20 Me. 339; Lecky *v.* McDermott, 8 S. & R. 500; Crumbacker *v.* Tucker, 4 Eng. (Ark.) 365; Doane *v.* Russell, 3 Gray 382; 2 Kent Com. 642; Briggs *v.* R. Co., 6 Allen 246; Grace *v.* Palmer, 8 Wheat. 665.

6 Edw. Bail. 414; Fox *v.* McGregor, 11 Barb. 41.

a right to hold, and not an interest in the property such as a pledgee has. The common law means of enforcing this right being somewhat imperfect in this respect,[1] it is not strange that by statute in some of the States, carriers and other bailees have been given power to sell for unpaid charges the goods in their hands, after reasonable notice.[2]

§ 27. **The Bailee's Lien Generally.**—Every bailee for hire, who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges; this includes all such manufacturers, mechanics, tradesmen and laborers as receive property for the purpose of repairing, or otherwise improving its condition.[3]

The lien at common law attaches only where the property is improved in value by the labor and services of the bailee,[4] and therefore, an agister[5] or a liverystable keeper[6] had no lien on the animal for its keep, though one to whom an animal was delivered either to train or cure, had.[7] A warehouseman, however, has a lien for his charges upon the property in

1 See Doane *v.* Russell, 3 Gray 386; but see Trustees *v.* Brighton Stock Yards, 27 Ohio St. 435.

2 See 2 Stim. Stat. L. § 8843.

3 Hutchins v. Olcutt, 4 Vt. 549; 24 Am. Dec. 635; White *v.* Smith, 44 N. J. (L.) 105; 43 Am. Rep. 347; Hanna *v.* Phelps, 7 Ind. 21; 63 Am. Dec. 410; Wilson *v.* Martin, 40 N. H. 88; Mathias *v.* Sellers, 86 Pa. St. 486; 27 Am. Rep. 723; Townsend *v.* Newell, 114 Pick. 332; Moore *v.* Hitchcock, 4 Wend. 372; Arians *v.* Brickley, 65 Wis. 26; 56 Am. Rep. 611; 26 N. W. Rep. 188; Pierce *v.* Sweet, 33 Pa. St. 151; East *v.* Ferguson, 59 Ind. 172; Shaw *v.* Ferguson, 78 Ind. 554. Morgan *v.* Congdon, 4 N. Y. 552.

4 White *v.* Smith, 44 N. J. (L.) 105; 43 Am. Rep. 34. A private carrier has no lien. Fuller *v.* Bradley, 25 Pa. St. 120.

5 Jackson *v.* Cummings, 5 M. & W. 342; Cummings v. Harris, 3 Vt. 244; 23 Am. Dec. 206; Grinnell *v.* Cook, 3 Hill 485; 38 Am. Dec. 667; Allen *v.* Ham, 63 Me. 532; Mauney *v.* Ingram, 78 N. C. 96; McDonald *v.* Bennett, 45 Ia. 456.

6 Judson v. Etheridge, 1 C. & M. 742; Miller *v.* Marston, 35 Me. 153; 56 Am. Dec. 694. By statute in some States such liens are now given.

7 Bevan *v.* Waters, 3 C. & P. 520; Forth *v.* Simpson, 13 Q. B. 680; Towle *v.* Raymond, 58 N. H. 64; Harris *v.* Woodruff, 124 Mass. 205; 26 Am. Rep. 658; Lord *v.* Jones, 24 Me. 439; 41 Am. Dec. 391. So a farrier for shoeing horses. Lord *v.* Jones, Id.

his hands.[1] This lien would seem to be inconsistent with that requisite of a common law lien, that the property held shall have been improved in value in some way; but the truth is, the warehouseman's lien is founded on usage, repeatedly proved and recognized until it has come to be considered an established right.[2] It is a specific lien; but where merchandise is stored in a warehouse, and portions of it are from time to time delivered out without the storage thereon being paid, the warehouseman has a lien upon the portion left for the storage of the whole.[3] This rule is considered as promoting the convenience of trade and business, without detriment to the parties in interest, and without subjecting them to the inconvenience and trouble of dividing up a single transaction into as many parts as there may have been different deliveries of portions of the same property.[4] The factor to whom goods are consigned for sale has, by custom, a general lien upon them for advances made or liabilities incurred thereon, and also for his reasonable charges or commissions.[5]

§ 28. **Joint Bailors and Joint Bailees.**—Chattels deposited by several joint owners must be redelivered on the joint demand of the persons making the deposit, and the bailee is not obliged to deliver to one without

1 McFarland *v.* Wheeler, 26 Wend. 267; Low *v.* Martin, 18 Ill. 286.

2 Naylor *v.* Mangles, 1 Esp. 109; Spears *v.* Hartley, 3 Esp. 81. But a private person not a warehouseman has no lien on a chattel he takes to keep. *re* Kelly, *post*: Alt *v.* Weidenburg, 6 Bosw. 176.

3 Schmidt *v.* Blood, 9 Wend. 268; 24 Am. Dec. 143; Steinman *v.* Wilkins, 7 W. & S. 466; 43 Am. Dec. 254; *re* Kelly 18 Fed. Rep. 528; Alt *v.* Weidenburg, 6 Bosw. 176.

4 Edw. Bail. 309.

5 Bell *v.* Palmer, 6 Cow. 128; Bryce *v.* Brook, 26 Wend. 367; Martin *v.* Pope, 6 Ala. 532; 41 Am. Dec. 66; Desha *v.* Pope, 6 Ala. 690; 41 Am. Dec. 76; Patterson *v.* McGahey, 8 Mart. 486; 13 Am. Dec. 298; Holbrook v. Wight, 24 Wend. 169; 35 Am. Dec. 607; Strahorn *v.* Union Stock Co., 43 Ill. 414; 92 Am. Dec. 142.

the consent of all.[1] But if the bailee accepts the property from one of them, by whom, as well as by the bailee, it is treated as belonging to him exclusively, he will be protected by a redelivery of the property to him who bailed it.[2] Where there are two or more joint depositaries, each is liable for the delivery of the whole deposit.[3] And where several hire a thing of another, each is liable to the bailor for an injury to it.[4]

§ 29. **Termination of the Bailment.**—The bailment is terminated in the following ways:

1. By the agreement of the parties.[5]

2. By the acts of the parties. The bailor, where no time is fixed, may terminate the bailment when he pleases, on his own motion,[6] but where no time for the re-delivery of the bailed article has been agreed upon, the bailee cannot be subjected to an action or suit at law without a previous demand having been made upon him for the goods, and a refusal on his part to restore them—unless such demand is rendered unnecessary by the bailee's misappropriation or other violation of duty on his part.[7] And though a gratuitous loan is revocable at the will of the bailor, yet if the lender do so unreasonably, while the object of the bailment is but partly accomplished, and actually occasions injury or loss to the borrower by so

1 Story Bail. § 114; Harper *v.* Goodsell, 18 W. R. 954; 39 L. J. Q. B. 185; Brandon *v.* Scott, 7 El. & Bl. 234; May *v.* Harvey, 13 East 197; Rand *v.* State Bk., 77 N. C. 152.

2 May *v.* Harvey, 13 East 197.

3 Story Bail. § 114.

4 O'Brien *v.* Bound, 2 Speers 495; 42 Am. Dec. 384.

5 Laws. Contr. § 200.

6 Howard *v.* Roeben, 33 Cal. 399; Winkley *v.* Foye, 33 N. H. 171; 66 Am. Dec. 715.

7 Brown *v.* Cook, 9 Johns. 361; Hill *v.* Wiggins, 31 N. H. 292; Duncan *v.* Magette, 25 Tex. 245; Nelson *v.* King, 25 Tex. 655; Beardslee *v.* Richardson, 11 Wend. 25; West *v.* Murphy, 3 Hill (S. C.) 284; McLain *v.* Hoffman, 30 Ark. 428; Phelps *v.* Bostwick, 22 Barb. 314; Montgomery *v.* Evans, 8 Ga. 178; Stewart *v.* Frazier, 5 Ala. 114; Jackman *v.* Partridge, 21 Vt. 558; Hosmer *v.* Clark, 2 Greenl. 308; Derrick *v.* Baker, 9 Port. 362; Magee *v.* Scott, 9 Cush. 148; 55 Am. Dec. 49; Negus *v.* Simpson, 99 Mass. 388; Ross *v.* Clark, 27 Mo. 549; Morse *v.* Crawford, 17 Vt. 499; 44 Am. Dec. 349.

doing, the latter may have a suit for damages; or may recoup his damages in an action brought against him for retaining the loan under such circumstances.[1] The owner of a pair of horses, for example, lends them to his neighbor to carry a load of provisions to a particular market; he cannot on the way, meet him and demand the immediate possession of the team, leaving the borrower to sustain the injury resulting from such an abrupt and unexpected termination of the loan.[2]

The bailee, where he has not stipulated to keep the goods for any particular length of time, may free himself from responsibility at his option, by restoring them to the bailor or notifying him to reclaim them;[3] when, if he does not do so, the bailee may store them at the bailor's risk and charge.[4] Where, however, the bailment is one to do a certain work on or with the chattel, or to hold it for a certain time, neither party can terminate the relation without the consent of the other till that is done, otherwise he will be liable in damages for a breach of his contract.[5]

3. By the expiration of the time for which the bailment was to continue or the accomplishment of the purpose for which the bailment was made, or by a delivery over of the bailed chattel in accordance with the trust.[6]

4. By the bailee transferring or otherwise violating his duty in regard to the things bailed, or dealing with them in any way not contemplated by the contract.[7]

1 Story Bail. § 257; Schoul. Bail. 87.

2 Edw. Bail. 144.

3 Roulston *v.* McClelland, 2 E. D. Smith 60.

4 Dale *v.* Brinckerhoff, 7 Daly 45.

5 Schoul. Bail. 66.

6 Story Bail. § 103; Bates *v.* Stanton, 1 Duer. 79; Chattahooche Bk. *v.* Schley, 58 Ga. 369.

7 King *v.* Bates, 57 N. H. 446; Mott *v.* Pettit, 1 N. J. (L.) 298; Crump *v.* Mitchell, 34 Miss. 449; Wilkinson *v.* Verity, L. R. 6 C. P. 206; Jenkins *v.* Bacon, 111 Mass. 373; 15 Am. Rep. 33; Kowing *v.* Manly, 49 N. Y. 192; 10 Am. Rep. 346; Stewart *v.* Frazier, 5 Ala. 114; Dunlap *v.* Gleason, 16 Mich. 158; 93 Am. Dec. 231.

5. By incapacity of one of the parties, as for example, marriage, if the party be a female; or insanity or idiocy.[1]

6. By the death of one of the parties. The death of the bailee is said to terminate the bailment, and generally, such an event would give the bailor a right at once to reclaim his property.[2] It seems, however, that where the bailment has been partly executed, the personal representatives of the bailee may be required to complete it.[3] Where the bailor dies, the authority or trust reposed in the bailee is ended; like in any agency the power is revoked by the death of the principal.[4]

7. By the bankruptcy of the bailor. "Where the bailee is to execute a mere authority, his own bankruptcy will not necessarily dissolve it, although it may, if the act to be done involve the expenditure of money."[5]

8. By any event which totally destroys the chattel bailed, without any fault on the part of the bailee; if destroyed by his fault, he is answerable for the damages, and if he is a hirer, probably also for the hire of the chattel during his term.[6]

9. By the bailee becoming the purchaser of the things bailed; but it will not be affected by a sale made by the bailor of his reversionary interest to a third person, for the reason that he can convey no greater interest than he possesses, and has not, during the bailment, a present right of possession.

10. The statute of limitations does not run against the bailor's right to recover the bailed chattel, so long

1 Edw. Bail. 120.

2 Smiley *v.* Allen, 13 Allen 465.

3 Story on Bailments, sec. 202; 2 Kent's Com. 643, 644; Schouler on Bailments, 71.

4 Laws. Contr. § 202; Story Bail. § 205; 2 Kent. Com. 646.

5 Edw. Bail. 124; Laws. Contr. § 202.

6 It seems it is not the duty of the bailee to pursue the property taken out of his hands without any omission of duty on his part; it is enough if he notify the bailor. Sessions *v.* R. Co., 16 Gray 132; Smith *v.* Frost, 51 Ga. 336.

as the bailment lasts, and has not been put an end to by the bailee refusing to return the property on demand, or otherwise denying the trust and claiming the chattel as his own. This is the rule as to trustees generally, and it applies, also, to bailees. But in equity the bailor's claim would, in cases of a great lapse of time, be barred upon that familiar principle of equity that a stale claim will raise the presumption that the property has at some previous time been transferred to the bailee by agreement of the parties.[1]

[1] See Reizenstein *v.* Marquardt, 39 N. W. Rep. 506 (Ia.). See *post*, § 70.

CHAPTER IV.

THE BAILMENT FOR THE BAILOR'S BENEFIT.

SECTION 30. The Deposit and Mandate.
31. Consideration Must be Absolutely Absent.
32. Any Indirect Benefit Sufficient.
33. Liability of Gratuitous Bailees.
34. Effect of Bailee's Previous Request.
35. Skilled Bailees.

§ 30. **The Deposit and Mandate.**—The bailments for the sole benefit of the bailor are the *depositum* and the *mandatum* of the civil law. The difference between the two is slight, and does not concern the nature of the contract, but only the mode of its performance, a deposit being the delivery of chattels to keep and return;[1] a mandate, the delivery of chattels to carry or do something about them[2]—the keeping, carrying, etc., being in both cases gratuitous, that is, without pay or reward. The modern cases on the subject of deposit and mandate are not numerous, both for the reason given by Sir William Jones, that it is an uncommon thing to undertake an office of trouble without compensation,[3] and for those of Judge Story,[4] that the fa-

[1] A customer of a bank leaves bonds and other securities and valuables in the bank safe, the bank receiving no pay for the service. This is a deposit. De Haven *v.* Kensington National Bank, 81 Pa. St. 95; First National Bank *v.* Graham, 79 Pa. St. 106; 21 Am. Rep. 49; Scott *v.* Nat. Bk., 72 Pa. St. 478; 13 Am. Rep. 711; Lancaster Co. Bk. *v.* Smith, 62 Pa. St. 47; see Connor *v.* Winton, 8 Ind. 315; 65 Am. Dec. 761; Rozelle *v.* Rhodes, 116 Pa. St. 129; 2 Am. St. Rep. 591; 9 Atl. Rep. 129.

[2] A undertakes to carry gratis a thing for B from C to D. This is a mandate: Gulledge *v.* Howard, 23 Ark. 61; Ferguson *v.* Porter, 3 Fla. 27. A purchases for B a draft to transmit for him to another place. A is not to be paid for his pains. This is a mandate: Eddy *v.* Livingston, 35 Mo. 487; 88 Am. Dec. 122.

[3] Jones Bail. 57.

[4] Story Bail. 218.

cilities of modern times to obtain all kinds of service, render it unnecessary to burden friends with the execution of such trusts, and that persons are unwilling to make their friends responsible for a meritorious, though negligent, kindness.[1]

§ 31. **Consideration Must be Absolutely Absent.** —The student of the law of Contract will have observed how, in the eye of the law, the most trifling benefit on the one hand, or detriment upon the other, will raise a sufficient consideration to support a promise.[2] And the same consideration will turn a gratuitous into a mutual benefit bailment. In order to make the bailment one for the sole benefit of the bailor, no benefit to the bailee, present or future, actual or contingent, certain or uncertain, direct or indirect, must arise.[3] The presumption always is that services rendered by one for another are for hire and not gratuitous,[4] and therefore, the fact that nothing was said about pay will not make the bailment a gratuitous one, provided the bailee had a right to charge, and it was the custom to do so in similar cases.[5] It is probably only where a man undertakes a bailment duty for a near relative or friend, where the doing of the thing puts him to little trouble, and requires little time or skill, and is quite outside his ordinary calling or occupation, that a pre-

1 4 Laws. Rights, Rem. & Pr., § 1706.

2 See Laws. Contr., § 93.

3 Newhall *v.* Paige, 10 Gray 366; Onderkirk *v.* Central Nat. Bank, 22 N. Y. St. Rep. 127; 4 N. Y. S. 734; Hollister *v.* Central Nat. Bank, 22 N. Y. St. Rep. 131, 4 N. Y. S. 737; Kellar *v.* Rhoads, 39 Pa. St. 513; 80 Am. Dec. 539; Gray *v.* Merriam, 35 N. E. Rep. 810 (Ill.).

4 Laws. Contr. § 38.

5 Pattison *v.* Syracuse Nat. Bank, 4 Thomp. & C. 96; Mariner *v.* Smith, 5 Heisk. 203; Kirtland *v.* Montgomery, 1 Swan, 452; Second Nat. Bank *v.* Ocean Nat. Bank, 11 Blatchf. 362; Rea *v.* Trotter, 26 Gratt 585; Swartz *v.* Houser, 10 Week. Notes 434. But that the bailee did or did not charge in one case is no evidence of whether he did or did not intend to in another. Lobenstein *v* Pritchett, 8 Kas. 213.

sumption arises that the service is intended to be gratuitous.[1]

In other cases, the circumstances must show that no charge was intended to be made or paid,[2] else a man who had been engaged in a trust service might escape liability for its negligent execution, at no more expense to him than the voluntary waiver of his expected compensation for a faithful execution—a proceeding which the law could scarcely countenance. Where it is clear, however, that the bailee neither expected nor received any thing of value for his pains, the bailment is a gratuitous one.[3]

§ 32. **Any Indirect Benefit Sufficient.** — Three modern cases will illustrate this. In England, a carrier, being also a wharfinger, received into his warehouse, goods of the plaintiff, on the terms that they should be conveyed by his barges to London, when the plaintiff should direct, at the usual freight, and that in the meantime they should be kept by him without charge for warehousing. In an action for not keeping the goods safely, it was held that he was not a gratuitous bailee.[4] Here it could hardly be denied that the agreement not to charge for storage entered into the whole contract of service, and was part of it. In Massachusetts a box was left at A's liquor store by an expressman. A received no compensation for the use of his store by expressmen except the advantage in their bringing him business, but the court ruled that A was

[1] Schoul. Bail. 35; Dart *v.* Lowe, 5 Ind. 131; Lafourche Navigation Co. *v.* Collins, 12 La. Ann. 117. But see Kincheloe *v.* Priest, 89 Mo. 240; 58 Am. Rep. 117; 1 S. W. Rep. 235.

[2] The bailee's secret purpose not to charge is immaterial if the bailor expected to pay. Second Nat. Bk. *v.* Ocean Nat. Bk., 11 Blatchf. 362.

[3] Minor *v.* R. Co. 19 Wis. 40; 88 Am. Dec. 670; Rea *v.* Trotter, 26 Gratt. 585; Lafourche Nav. Co. *v.* Collins, 12 La. Ann. 119.

[4] White *v.* Humphrey, 11 Q. B. 43.

a bailee for hire of the box,[1] saying: "A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and amount of the compensation are immaterial. The law will not inquire into its sufficiency or the certainty of its being realized by the bailee. The real question is, Was the contract made for a consideration? If so, then it was a *locatum*, and not a *depositum*, and the defendants were liable for a want of ordinary care. The general rule as to the consideration of a contract is well understood, and is the same in case of bailments as in all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may inure to the benefit of the party making the promise."[2] In Indiana, the bailment was held one for hire where the plaintiff, in response to an invitation, sent his gun to an agricultural fair to exhibit. "The case made by the complaint is one of bailment. The bailment was not a gratuitous one, for the reason that the exhibition of the gun, in response to the invitation contained in the advertisement of the appellant, constituted a consideration for the undertaking. It may be true that both parties derived a benefit, but this did not strip the contract of its character—that of a bailment for reward. The reward was not, it is true, in money, but it was, nevertheless, a reward in the form of an act performed at the request of the bailee. An association which invites persons to supply articles to enable it to conduct an exhibition,

1 Newhall *v.* Paige, 10 Gray, 366.

2 Citing Haigh *v.* Brooks, 10 Ad. & E. 320; 2 Perry & D. 484; Lawrence *v.* McCalmont, 2 How. 452; Hubbard *v.* Coolidge, 1 Metc. 92.

receives some consideration from the person who responds to its invitation by placing articles in its care for exhibition."[1]

§ 33. **Liability of Gratuitous Bailees.** — It is usually laid down in the cases without more that a bailee without reward, whether the bailment be a deposit[2] or a mandate,[3] is not liable for a loss of or injury to the bailed article unless it was the result of gross negligence on his part.[4] Such a statement, however,

1 Vigo Agric. Soc. *v.* Brumfiel, 102 Ind. 146; 52 Am. Rep. 657; 1 N. E. Rep. 382, and see Smith *v.* Library Board, 59 N. W. Rep. 979 (Minn.).

2 Wiser *v.* Chesley, 53 Miss. 547; Mariner *v.* Smith, 5 Heisk. 203; Dunn *v.* Branner, 13 La. Ann. 452, Maury *v.* Coyle, 34 Md. 235; Knowles v. R. R. Co. 38 Me. 55; 61 Am. Dec. 234; Green *v.* Buchard, 27 Ind. 483; Dart *v.* Low, 5 Ind. 131; Giblin McMullen, L. R. 2 P. C. 317; Edson *v.* Weston, 7 Cow. 278; Smith *v.* First Nat. Bank, 99 Mass. 605; 97 Am. Dec. 59; De Haven *v.* Kensington Bank, 81 Pa. St. 95; First Nat. Bank *v.* Graham, 79 Pa. St. 106; 21 Am. Rep. 49; Scott *v.* Nat. Bank, 72 Pa. St. 478; 13 Am. Rep. 711; Lancaster Co. Bank *v.* Smith, 62 Pa. St. 47; Chase *v.* Maberry, 3 Harr. (Del.) 266; Dougherty *v.* Posegate, 3 Iowa, 88; Mechanics' Bank *v.* Gordon, 5 La. Ann. 607; Green *v.* Hollingsworth, 5 Dana, 173; 30 Am. Dec. 680; Hills *v.* Daniels, 15 La. Ann. 280; Sodowsky *v.* McFarland, 3 Dana, 205; Spooner *v.* Mattoon, 40 Vt. 300; 94 Am. Dec. 395; Monteath *v.* Bissell, Wright, 411; McKay *v.* Hamblin, 40 Miss. 472; Carrington *v.* Ficklin, 32 Gratt. 670; Danville Bank *v.* Waddill, 31 Gratt. 469; Bronnenburg *v.* Charman, 80 Ind. 475.

3 Skelley *v.* Kahn, 17 Ill. 170; Storer *v.* Gowan, 18 Me. 174; Tracy *v.* Wood, 3 Mason 132; Bland *v.* Womack, 2 Murph. 373; Eddy *v.* Livingston, 35 Mo. 487; 88 Am. Dec. 122; Lampley *v.* Scott, 24 Miss. 528; Kemp *v.* Farlow, 5 Ind. 462; Lobenstein *v.* Pritchett, 8 Kan. 213; McCauley *v.* Davidson, 10 Minn. 418; Mariner *v.* Smith, 5 Heisk. 203; Gulledge *v.* Howard, 23, Ark. 61; Ferguson *v.* Porter, 3 Fla. 27; Colyar *v.* Taylor, 1 Cold. 372; Fulton *v.* Alexander, 21 Tex. 148; McNabb *v.* Lockhart, 18 Ga. 495; Persch *v.* Quiggle, 57 Pa. St. 248; Percy *v.* Millaudon, 20 Mart. 75; Jourdan *v.* Reed, 1 Iowa, 135; Hyland *v.* Paul, 33 Barb. 241; Stanton *v.* Bell, 2 Hawks, 145; 11 Am. Dec. 744; Beardslee *v.* Richardson, 11 Wend. 25; 25 Am. Dec. 596; Lloyd *v.* West Branch Bank, 15 Pa. St., 172; 53 Am. Dec. 581; Jenkins *v.* Motlow, 1 Sneed, 248; 60 Am. Dec. 154; Connor *v.* Winton, 8 Ind. 315; 65 Am. Dec. 751.

4 Tompkins *v.* Saltmarsh, 14 Serg. & R. 275; Whitney *v.* Lee, 8 Met. 91; McKay *v.* Hamblin, 40 Miss. 472; Spooner *v.* Mattoon, 40 Vt. 300; 94 Am. Dec. 395; First Nat. Bank *v.* Ocean Bank, 60 N. Y. 278; 19 Am. Rep. 181; Griffith *v.* Zipperwick, 28 Ohio St. 388; Tracy *v.* Wood, 3 Mason 132; Haynie *v.* Waring, 29 Ala. 265; Bissell *v.* R. R. Co., 29 Barb. 615; Grant *v.* Ludlow, 8 Ohio St. 48; Needles *v.* Howard, 1 E. D. Smith, 62; Green *v.* Hollingsworth, 5 Dana, 173; 30 Am. Dec. 680; Conwell *v.* Smith, 8 Ind. 530; Gulledge *v.* Howard, 23 Ark. 61; Dart *v.* Low, 5 Ind. 131; Johnson *v.* Reynolds, 3 Kan. 257; Bakewell *v.* Talbot, 4 Dana, 216; Tudor *v.* Lewis, 3 Met. (Ky.) 378; Fulton *v.* Alexander, 21 Tex. 148; Maury *v.* Coyle, 34 Md. 235; Wiser v. Chesley, 53 Mo. 547; Patterson *v.* McIver, 90 N. C. 493; Lloyd *v.* West Branch Bank, 15 Pa. St. 172; 53 Am. Dec. 581; De Haven *v.* Kensington Bank, 81 Pa. St. 95; Connor *v.* Winton, 8 Ind. 315; 65 Am. Dec. 761; Minor *v.* R. R. Co., 19 Wis. 40; 88 Am. Dec. 670; Eddy *v.* Livingston, 35 Mo. 487; 88 Am. Dec. 122.

affords little aid to the student in the absence of any explanation as to what is meant by "gross"—a word, the use of which, in this connection, has, as we have already seen,[1] been much criticised. In an English case, Taunton, J., said that gross negligence was "a great and exaggerated degree of negligence, as distinguished from negligence of a lower degree,"[2] which is probably as accurate a definition as can be framed. But as we have said once before, negligence is but the absence of care, according to the circumstances of the particular case, and consequently, gross negligence must be the absence of a lower degree of care than is required to constitute negligence of a less "exaggerated degree."

To give to a jury a legal test by which the particular facts may be judged, some courts have defined gross negligence to be the absence of that degree of care which the bailee exercises over his own property of a similar kind in similar circumstances.[3] It can hardly be denied that the fact that the bailee has lost his own goods at the same time, is very strong evidence in his favor,[4] yet it is not conclusive, for it is to be remembered that the loss of his own goods may be a comparatively trivial circumstance to him, while the loss of the bailed goods may be an irreparable injury to the

1 *Ante.* § 11.

2 Doorman *v.* Jenkins, 2 Ad. & Ell. 256.

3 Foster *v.* Essex Bk., 17 Mass. 479; 9 Am. Dec. 168; Rozelle *v.* Rhodes, 116 Pa. St. 129; 2 Am. St. Rep. 591; 9 Atl. Rep. 129; Story Bail., secs. 63, 64, 183; Schoul. Bail., 44-48; First Nat. Bank *v.* Graham, 79 Pa. St. 106; 21 Am. Rep. 49; Knowles *v.* R. R. Co., 38 Me. 55; 61 Am. Dec. 234.

4 Edw. Bail., 35. A, a general merchant, undertakes voluntarily and without reward to enter a parcel of goods, the property of B, together with a parcel of his own of the same sort, at the custom-house for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. A, having taken the same care of the goods of B as of his own, and not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, was not liable to an action for the loss occasioned to B: Shiells *v.* Blackburne, 1 H. Black, 158.

bailor.[1] By other writers, and in other cases it has been said that gross negligence is the want of that care which every man of common sense, how inattentive soever, takes of his own property,[2] which approaches very near to a positive breach of good faith or fraud.[3]

The best criterion is, however, the *amount of care which gratuitous bailees, under the same state of affairs, take of similar chattels.*[4] That the same care as is exacted of a paid bailee, the law ought not justly to require, is obvious, for where a man trusts his property to another to be kept or carried to a certain place, he surely ought to be satisfied with a modified care of his goods, as he saves the remuneration he would have paid to a warehouseman or a carrier. Again, it is generally understood that if you want a good article you must pay a good price for it. In like manner, services which are not to be paid for are not valued very highly or thought very much of by the majority of men. "It seems," says Mr. Browne,[5] "to be a piece of practical wisdom to understand that if you want a thing, you must pay for it. It matters not whether it be talent or tallow, skill or skins. Nothing for nothing is the rule of business." The majority of men do not expect any considerable degree of care to be exercised over property under such circumstances, and it is safe to say that what they do not expect they do not usually get. And knowing this, if a man trusts his chattels to an unpaid bailee, he cannot ask more than other unpaid bailees give.

1 Browne Carr. § 28; Tracy *v.* Wood, 3 Mason, 12. On the other hand it is always regarded as suspicious for a bailee to claim to have lost the bailed chattels and to have saved his own when both were together. Bland *v.* Womack, 2 Murph. 273.

2 Edw. Bail. § 44.

3 Edw. Bail. § 67.

4 Browne Carr. § 28; Tracy *v.* Wood, 3 Mason, 132; Anderson *v.* Forseman, Wright, 598; Bland *v.* Womack, 2 Murph., 373; Preston *v.* Prather, 137 U. S. 604; 11 S. C. Rep. 162; Gray *v.* Merriam, 35 N. E. Rep. 810 (Ill.).

5 Carr., § 22.

Still, the bailor has a right to expect some care.[1] By his representations, or his accession to the wishes of his neighbor, the bailee has led him to repose a confidence in him; he has induced him to believe, not only by his words, but by his acts, in undertaking what he promised, that he would exercise some sort of common sense in the matter. If the chattels were animals which he agreed to keep, he would be bound to feed them, for it would be ridiculous to imagine that a man would put his cattle in another's hands in order that they might starve to death. This is an extreme case, of course.

For those losses, therefore, to which every man's own property is exposed, such as by larceny or robbery,[2] by fire or storm,[3] or the act of God,[4] the gratuitous bailee is not responsible, unless the loss or injury arose through the omission by him of that care which he is called upon to exercise.[5] In one case, the defendant, a banker, twice a year examined special deposits to which K, his assistant cashier, had access. K stole a deposit and absconded. More than a year before, the banker was warned that K was speculating, but K was retained even after a second warning two months

1 Connor *v.* Winton, 8 Ind. 315; 65 Am. Dec. 761.

2 Furber *v.* Barnes, 32 Minn. 105; 19 N. W. Rep. 728; First Nat. Bk. *v.* Ocean Bk., 60 N. Y. 278; 19 Am. Rep. 181; Giblin *v.* McMullen, L. R. 2 P. C. 317; DeHaven *v.* Kensington Bank, 81 Pa. St. 95; Jenkins *v.* Motlow, 1 Sneed, 248; 60 Am. Dec. 154; Tancil *v.* Seaton, 28 Gratt. 601; 26 Am. Rep. 380; Schermer *v.* Neurath, 54 Md. 491; 39 Am. Rep. 397; Levy *v.* Bergeron, 20 La. Ann. 290; Scott *v.* Bank, 72 Pa. St. 471; 13 Am. Rep. 711; Foster *v.* Bank, 17 Mass. 479; 9 Am. Dec. 168; Smith *v.* Bank, 99 Mass. 605; 97 Am. Dec. 59; Davis *v.* Gay, 141 Mass. 531; 6 N. E. Rep. 549; Rea *v.* Simmons, 141 Mass. 561; 6 N. E. Rep. 699; Glover *v.* Burbridge, 27 S. C. 305; Metzger *v.* Franklin Bk., 119 Ind. 359; 20 N. E. Rep. 720; Spooner *v.* Mattoon, 40 Vt. 300; 74 Am. Dec. 395.

3 Mein *v.* West, Charlt. 170.

4 La Borde *v.* Ingrahan, 1 N. M. 419.

5 Coggs *v.* Bernard, 2 Ld. Ray. 907; Doorman *v.* Jenkins, 2 Ad. & Ell. 256; Griffith *v.* Zipperwick, 28 Ohio St. 388; Cannon & Manfg. Co. *v.* Bank, 37 Minn. 394; 34 N. W. Rep. 741; Dunbar *v.* Hughes, 6 La. Ann. 461; Lethbridge *v.* Phillips, 2 Stark, 544; Eddy *v.* Livingston, 35 Mo. 487; 88 Am. Dec. 122; Jenkins *v.* Motlow, 1 Sneed, 248; 60 Am. Dec. 154; Woolf *v.* Bernero, 14 Mo. (App.) 518; Eldridge *v.* Hill, 97 U. S. 92.

before he fled.[1] In another, a letter-carrier delivered a registered letter to the defendant, the clerk of a hotel, where the addressee was stopping as a guest. The clerk signed the return receipt, and also the letter-carrier's book, and placed the letter in the letter-box of the hotel, from whence it was stolen.[2] In both the bailee was held liable; the banker, because no careful banker would retain an employe under such circumstances, and the clerk, because the fact that a receipt was asked for the letter was notice to him that it was of special importance and not to be treated as an ordinary letter.

§ 34. **Effect of Bailee's Previous Request.**—Where, however, a person voluntarily and officiously proposes to keep the goods of another, there is said to be a sound reason why he should be held to a stricter liability, viz., that he may thereby have prevented the owner from entrusting them to a more careful person. Mr. Edwards,[3] while approving this principle when applied to a deposit, criticises it in its application to a mandate because "as the owner acts voluntarily, there does not seem to be any sound reason why a friend, whose kindness prompts him to offer his services, should be held to a stricter rule of liability than is demanded of a stranger,"[4] and no doubt because the older writers, while holding in such case the officious depositary liable for ordinary neglect, held the officious mandatory liable for slight neglect[5]—a distinction rather difficult to grasp. There appears to be no direct adjudica-

[1] Prather *v.* Kean, 29 Fed. Rep. 498; Gray *v.* Merriam, 35 N. E. Rep. 810 (Ill.); Merchants Nat. Bk. *v.* Guilmartin, 35 S. E. Rep. 55 (Ga.).

[2] Joslyn *v.* King, 27 Neb. 38; 42 N. W. Rep. 756.

[3] Bail. §§ 35, 39

[4] Bail. § 135.

[5] Jones Bail. § 48.

tion on the subject, but the difference between a case where A asks B to keep his books for him or to carry a letter for him, and where B asks A to allow him to do so, seems obvious. The request coming from B turns the bailment into one founded on a consideration, viz., the act of A acceding to B's request,[1] and B is liable for ordinary care, and the bailment is a mutual benefit bailment.

§ 35. **Skilled Bailees.**—There is still another qualification to the rule as stated in the former sections, which is that even a gratuitous bailee, if he undertakes to do something requiring skill, is bound to exercise such an amount of skill as, by his profession, by his conduct, by his actions, or by his ordinary business relations, he pretends to the public to possess.[2] "If a man," it is said, in an early English case,[3] "applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery. But if the patient applies to a man of different employment or occupation for gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such a person is not liable." So in a later case, a person skilled in the riding or management of horses, who, at the request of a friend, rode his horse for the purpose of exhibiting him, was held responsible for not using the skill which he possessed.[4]

1 Bainbridge *v.* Firmstone, 8 Ad. & Ell. 743; Laws. Contr. § 93.

2 Stanton *v.* Bell, 2 Hawks 145; 11 Am. Dec. 74; Connor *v.* Winton, 8 Ind. 315; 65 Am. Dec. 761.

3 Shiells *v.* Blackburne, 1 H. Bl. 159.

4 Wilson *v.* Brett, 11 M. & W. 113.

This is not unreasonable, as the bailor may have been induced to trust the bailee solely on account of the skill which he knew him to possess. Likewise, the law seeks to discourage persons from holding themselves out as qualified to do what they either cannot or do not intend to do.

74

CHAPTER V.

THE BAILMENT FOR THE BAILEE'S BENEFIT.

SECTION 36. The Gratuitous Loan.
37. Benefit Must be all on Borrower's Side.
38. Liability of Borrower.

§ 36. **The Gratuitous Loan.** —The *commodatum* of the civil law—the single bailment for the sole benefit of the bailee—is the gratuitous loan, as where A, without it being intended that he shall pay for the use, borrows a thing from B for a time, it being understood that the identical thing lent shall be returned to B.[1] In this bailment, unlike the two gratuitous bailments in the previous chapter, the bailee is entitled to use the thing bailed.[2]

§ 37. **Benefit Must be all on Borrower's Side.**— The benefit must be all on the side of the bailee—hence if it appears that the bailor is benefited by the transaction, it is not a loan, but a bailment for hire.[3] Thus, where the plaintiff, having a horse for which he had no use, to avoid the expense of keeping, requested the defendant to take it and do his work with it in consideration of its feed and keeping, it was held, that this was not a mere gratuitous loan, under which the defendant would be required to exercise extraordinary care, but a contract for the mutual benefit of both par-

1 If the identical thing is not to be returned it is not a loan. See *ante* § 8; Fosdick *v.* Greene, 27 Ohio St. 404; 22 Am. Rep. 328; and the borrowing must be with the owner's consent. State *v.* Bryant, 74 N. C. 124.

2 Schoul. Bail. 85.

3 Carpenter *v.* Branch, 13 Vt. 161; 37 Am. Dec. 250; Putnam *v.* Wyley, 8 Johns. 432.

ties, under which the defendant was required to exercise only ordinary care in the keeping and care of the animal.[1] But at the same time, the mere fact that the borrower of an animal is at the expense of feeding it and taking care of it, makes it none the less a gratuitous loan.[2]

In every case where goods are lent for a use in which the lender has a common interest with the borrower, as in other bailments reciprocally advantageous, the bailee is responsible for only ordinary negligence, and is liable for their return in the same manner as a bailee for hire, as for example, an agreement whereby a person undertakes to make a horse gentle and fit for the use of the owner's family, in consideration of permission to ride it.[3] So, where goods are lent for the sole advantage of the lender, the obligations and duty of the borrower must be modified and reduced to the standard of those exacted of a depositary without reward. Thus, to use the illustration given by Sir William Jones, if a passionate lover of music were to lend his own instrument to a player in a concert, merely to augment his pleasure from the performance, and the musician were to play with all due skill and exertion, but were to break or hurt the instrument, without any malice or very culpable negligence, he would not be bound to indemnify the lender. Neither of these are properly "loans."

§ 38. **Liability of Borrower.**—The borrower is required to be extremely careful of goods and chattels, the use of which he receives gratuitously. The relation in which he stands makes it appropriate that the law should be construed rigorously against him for his

1 Chamberlain *v.* Cobb, 32 Iowa 161.
2 Bennett *v.* O'Brien, 37 Ill. 250.
3 Neal *v.* State, 26 S. W. Rep. 726 (Tex.).

acts of neglect. Having received a favor, it is adjudged a great fault in him to be guilty of even slight negligence, through which the confidence and trust reposed in him are converted into an injury to his friend.[1] He is obliged to use extraordinary care,[2] and is liable for slight neglect.[3]

But his undertaking is not to restore the thing at all events, and therefore, he is not responsible for loss of or damage to the borrowed chattel, caused by inevitable accident, the act of God, the public enemy, fire, natural causes or robbers, or thieves,[4] provided, always, that he can show that the act could not have been seen or prevented, and that no fault of his contributed to create or enhance the peril.[5] If, for example, the borrower of a horse ride by a ruinous house, in manifest danger of falling, and it actually fall and kill the horse, he will be responsible for its value; though he would not be answerable if the house, being in good condition, fell by the violence of a sudden hurricane.[6]

When the house of the borrower is on fire, it is said by Kent that if he saves his own goods, and is not able to save the articles borrowed without abandoning his

1 Edw. Bail. 44; Jones Bail. 36, 117.

2 I. E. that degree of care and diligence that the most careful persons are accustomed to apply to their own affairs.

3 Fortune *v.* Harris, 6 Jones, 532; Scranton *v.* Baxter, 4 Sand. 5; Hagebush *v.* Ragland, 78 Ill. 49; Green *v.* Hollingsworth, 5 Dana, 173; 30 Am. Dec. 680; Wood *v.* McClure, 7 Ind. 155; Coggs *v.* Bernard, 2 Ld. Raym. 909; Rooth *v.* Wilson, 1 Barn. & Ald. 59; Howard *v.* Babcock, 21 Ill. 259; Bennett *v.* O'Brien, 37 Ill. 250; Phillips *v.* Cardon, 14 Ill. 84; Carpenter *v.* Branch, 13 Vt. 161; 37 Am. Dec. 587; De Tollenere *v.* Fuller, 1 Mill Const. 117; 12 Am. Dec. 616. Todd *v.* Figley, 7 Watts, 542, the Court saying: "The bailee or defendant below being the only person, as it would seem, who was to be benefited by the loan of the mare, was therefore bound by the obligation from his implied contract to take extraordinary care of her; and he became liable to make good to the plaintiff below any loss which he might sustain by reason of an injury happening to the mare, even from slight neglect on the part of him, the defendant."

4 Story Bail. §§ 239, 240; Schoul Bail. 81; Beller *v.* Schultz, 44 Mich. 529; 38 Am. Rep. 280; 7 N. W. Rep. 225; Whitehead *v.* Vanderbilt, 10 Daly, 214; Watkins *v.* Roberts, 28 Ind. 167; Fortune *v.* Harris, 6 Jones, 532.

5 De Tollenere *v.* Fuller, 1 Mill, 117; 12 Am. Dec. 616.

6 Edw. Bail. 139.

own, he must pay for the loss, because he uses less care of the articles borrowed than of his own property, and gives the preference to his own. But he raises the question, if the borrower's goods are more valuable than those borrowed, and both cannot be saved, whether he is bound in that case to prefer the less valuable borrowed chattels? He answers the question by stating the conclusions of Pothier, that he is liable, without expressing any opinion of his own. Story, discusses the point at considerable length, and maintains that the borrower, upon principle, ought not to be held liable in such a case. The question has not arisen in any decided case in our courts, and in the opinion of Mr. Edwards, is more interesting and speculative than practical.[1]

[1] Edw. Bail. § 170.

CHAPTER VI.

THE MUTUAL BENEFIT BAILMENT.

SECTION 39. The Classes of Mutual Benefit Bailments.
40. The Standard of Care and Responsibility.

(a) Hire of Things.

41. The Hire of the Use of a Thing.
42. The Hirer's General Responsibility.

(b) Hire of Labor and Services.

43. The Workman, Manufacturer, Laborer or Artisan.

(c) Hire of Care or Custody.

44. The General Principle.
45. The Agister.
46. The Liveryman.
47. The Warehouseman.
48. The Wharfinger.

(d) Hire of Carriage.

49. The Private Carrier.

§ 39. **The Classes of Mutual Benefit Bailments.** —The *locatio-conductio* of the civil law, the hiring for reward, or the mutual benefit bailment, embraces a great variety of the contracts made every day between man and man. Remembering the requisite to a bailment, as stated heretofore, viz., that the specific article is to be re-delivered, we must at the outset exclude from the bailment law the ordinary hire of labor or services alone. But whenever one delivers to a tailor a piece of cloth out of which a garment is to be made, or to a jeweler his watch to be repaired, or to a shoemaker his boot to be resoled, or to a warehouseman his furniture

to be kept, or to a farmer his horse to be pastured, or whenever he hires a horse and carriage from a liveryman for a drive, the bailment relation is created. And not only in private life, but in the commercial world, this species of bailment is in daily use. The warehouseman who stores for the merchant his hogsheads of sugar and his bales of cotton; the safe depositary in whose boxes lie the bonds and securities of the capitalist;[1] the wharfinger in whose charge remain for a time the consignments of goods from foreign shores; the miller who grinds corn, as well as he who saws logs,[2] and the vast army of mechanics and artisans who do work upon a chattel, be it wood, or marble, or cloth—these are bailees.[3] In this class, unlike the case of the gratuitous bailment, an action will lie for the failure of the one to make or the other to accept the promised bailment.[4]

These bailments are divided into (*a*) the hire of a thing for use; (*b*) the hire of labor and service upon a thing; (*c*) the hire of care or custody of a thing; and (*d*) the hire of carriage or transportation of a thing.

§ 40. **The Standard of Care and Responsibility.** —The same standard of care and responsibility attaches to all of these, the transaction being mutually beneficial to both parties; the bailee is required to exercise a degree of diligence greater than that which is demanded of the bailee without reward, but less than that which is demanded of the borrower. The relation changing, the liability changes also. The price of the hire, balances the use, so that neither owes to the other

[1] Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391; 27 Am. Rep. 660.

[2] Gleason *v.* Beers, 59 Vt. 581; 59 Am. Rep. 757; 10 Atl. Rep. 86; Wallace *v.* Canady, 4 Sneed 364; 70 Am. Dec. 255.

[3] The ordinary workman, as has been said, has no custody of the chattel on which he works, and is therefore not a bailee but a servant.

[4] Story Bail. §§ 384, 386.

any special obligation. The contract between them is one of ordinary business, from which both derive a benefit of profit or convenience. In the employment of property received under such circumstances, it is obvious that the bailee can only be held responsible for the use of ordinary care and common prudence in its preservation. If he exercise the common vigilance which the generality of mankind take of their own property, it will protect him from liability. In the absence of an express agreement, the law implies nothing strained or unreasonable; it is satisfied with the usual and ordinary care incident to the custody of another's goods.[1] The bailee of this class, then, is held to ordinary diligence, *i. e.*, such care and diligence as prudent persons of the same class are wont to exercise in the conduct of their own affairs under like circumstances, and is liable only for a loss or injury caused by ordinary negligence—*i. e.*, the absence of ordinary care.

He is, therefore, not responsible for a loss occasioned by fire,[2] or by the act of God, or inevitable accident,[3] or by burglary, robbery, or theft,[4] or a public enemy[5]—unless the loss has been brought about by the negli-

1 Edw. Bail. § 39; Taussig *v.* Shields, 26 Mo. (App.) 318. See cases cited in the succeeding sections.

2 Norway Plains Co. *v.* R. Co., 1 Gray, 263; 61 Am. Dec. 423; Francis *v.* R. Co., 25 Iowa, 60; 95 Am. Dec. 769; Russell *v.* Koehler, 66 Ill. 459; Francis *v.* Castleman, 4 Bibb, 282; McCollum *v.* Porter, 17 Lr. Ann. 89; Macklin *v.* Frazier, 9 Bush, 3; Aldrich v. R. R. Co., 100 Mass. 31; 97 Am. Dec. 74; Gibson v. Hatchett, 24 Ala. 201; Hatchett *v.* Gibson, 13 Ala. 587; Irons *v.* Kentner, 51 Iowa, 88; 33 Am. Rep. 119.

3 Knapp *v.* Curtis, 9 Wend. 70; McCollum *v.* Porter, 17 La. Ann. 89; Jones *v.* Gilmore, 91 Pa. St. 310.

4 Schwerin v. McKie, 51 N. Y. 180; 10 Am. Rep. 581; Platt *v.* Hibbard, 7 Cow. 497; Schmidt *v.* Blood, 9 Wend. 268; 24 Am. Dec. 143; Claflin *v.* Meyer, 75 N. Y. 260; 31 Am. Rep. 467; Moore *v.* Mayor, 1 Stew. 284; Cincinnati etc. R. R. Co. *v.* McCool, 26 Ind. 140; Lamb *v.* R. R. Co., 7 Allen, 98; Cass *v.* R. R. Co., 14 Allen, 448; Williams v. Holland, 22 How. Pr. 137; Neal *v.* R. R. Co., 8 Jones, 482; Pike v. R. R. Co., 40 Wis. 583; Berry *v.* Marcix, 17 La. Ann. 248; Walker *v.* British Guarantee Assn., 18 Q. B. 277.

5 Abraham *v.* Nunn, 42 Ala. 51; Yale *v.* Oliver, 21 La. Ann. 454; Smith *v.* Frost, 51 Ga. 336; Waller *v.* Parker, 5 Cold. 476; Babcock *v.* Murphy, 20 La. Ann. 399; McCranie *v.* Wood, 24 Lo. Ann. 406. Thieves, tramps and robbers are not "public enemies." State *v.* Moore, 74 Mo. 413; 41 Am. Rep. 332.

gence of the bailee, either in preventing such a calamity or in lessening its injurious effects.[1] He is liable for a negligent injury, though after the happening of the injury, the goods were destroyed without his fault, and would have been so destroyed had they not been previously injured.[2]

(a). *Hire of Things.*

§ 41. **The Hire of the Use of a Thing.**—This class of bailment is created where one obtains, for a consideration, the use of another's goods for a term. The compensation to be paid for the use distinguishes this from the loan, for where the least consideration is found, it is a hiring and not a loan.[3] A chattel being in another's possession with a right to use it a hiring is presumed;[4] but proof of a loan will not sustain an action for hire.[5] He who hires goods or chattels for use acquires a possessory interest in them during the term of his contract; he contracts for, or purchases the use of the chattels for the period or purposes of the contract. The price paid or promised, either expressly or impliedly, is the consideration for the use; so that the hirer becomes the temporary proprietor of the things bailed. A contract of hiring need not be in writing.[6]

1 Smith *v.* Meegan, 22 Mo. 150; 64 Am. Dec. 256; Schwerin *v.* McKie, 51 N. Y. 180; 10 Am. Rep. 581; Jones *v.* Morgan, 90 N. Y. 4; 43 Am. Rep. 131; Merchants Trans. Co. *v.* Story, 50 Md. 4; 33 Am. Dec. 293; Vincent *v.* Rather, 31 Tex. 77; 98 Am. Dec. 516; Stevens *v.* R. Co., 1 Gray, 277; Madan *v.* Covert, 42 N. Y. (S. C.) 135; Smith *v.* Frost, 51 Ga. 336; Schwartz *v.* Baer, 21 La. Ann. 601; Gibson *v.* Hatchett, 24 Ala. 201; Hatchett *v.* Gibson, 13 Ala. 557; Francis *v.* Castleman, 4 Bibb, 482.

2 Powers *v.* Mitchell, 3 Hill, 545.

3 Carpenter *v.* Branch, 13 Vt. 161; 37 Am. Dec. 557; Chamberlain *v.* Cobb, 32 Ia. 160; Francis *v.* Schrader, 67 Ill. 272; Gaff *v.* O'Neil, 2 Cin. Rep 246; Putnam *v.* Wyley, 8 Johns. 432; 5 Am. Dec. 346.

4 Reilly *v.* Rand, 123 Mass. 215.

5 Dunham *v.* Kinnear, 1 Watts, 130.

6 Foreman *v.* Drake, 98 N. C. 311; 3 S. E. Rep. 842.

§ 42. **The Hirer's General Responsibility.**—The bailment being a mutual benefit one, the hirer is liable for ordinary neglect only; and like other bailees of this class, is not responsible if the thing hired is lost or injured through fire, robbery or theft, accident or superior force,[1] unless his neglect contributed thereto.[2] The owner is his own insurer against the perils that belong to the service of the thing hired.[3] The hirer of an animal is not responsible for its falling sick or lame or dying while in his care.[4] The hirer of a horse is liable for failing to use reasonable prudence and skill in driving it whereby it is injured;[5] or in his care of it, as where he overfeeds or overwaters it, and it dies thereof;[6] or where he was told before he had accomplished more than a small portion of his journey that the horse was sick, but he continued on, and the animal died at the end of the journey.[7]

(b). *Hire of Labor and Services.*

§ 43. **The Workman, Manufacturer, Laborer or Artisan.**—The bailee receiving materials to manufacture, or goods of any kind to perform work upon,

1 Schoul. Bail. § 132; Story Bail. § 398; Handford *v.* Palmer, 2 Bos. & P. 359; Chamberlain *v.* Cobb, 32 Iowa, 61; Eastman *v.* Sanborn, 3 Allen, 594; 81 Am. Dec. 677; Mooers *v.* Larry, 15 Gray, 451; Jackson *v.* Robinson, 18 B. Mon. 1; Angus *v.* Dickerson, 1 Meigs, 459; Milton *v.* Salisbury, 13 Johns. 211; Brown *v.* Waterman, 10 Cush. 117; Swigert *v.* Graham, 7 B. Mon. 661; Downey *v.* Stacey, 1 La. Ann. 426; Field *v.* Brackett, 56 Me. 121; McEvers *v.* Steamboat Sangamon, 22 Mo. 187; Watkins *v.* Roberts, 28 Ind. 167; Hyland *v.* Paul, 33 Barb. 241; St. Paul etc. R. R. Co. *v.* R. R. Co., 26 Minn. 243; 37 Am. Rep. 404; 2 N. W. Rep. 700; Longman *v.* Caleni, Abbott on Shipping, 270, note; Conwell *v.* Smith, 8 Ind. 530; Stewart *v.* R. Co., 4 Biss. 362.

2 Eastman *v.* Sanborn, 3 Allen, 594; 81 Am. Dec. 667; Edwards *v.* Carr, 13 Gray, 234; Banfield *v.* Whipple, 10 Allen, 27; 87 Am. Dec. 618; Buis *v.* Cook, 60 Mo. 391; Wentworth *v.* McDuffie, 48 N. H. 402; Cross *v.* Brown, 41 N. H. 283; Thompson *v.* Harlow, 31 Ga. 148; McNeill *v.* Brooks, 1 Yerg. 73; Ray *v.* Tubbs, 50 Vt. 688; 26 Am. Rep. 519.

3 Reeves *v.* The Constitution, Gilp. 579. The hirer of a horse and carriage would not be liable even for immoderate driving if the owner sent his own driver. Hughes *v.* Boyer, 9 Watts, 556.

4 Millon *v.* Salisbury, 13 Johns. 211; Buis *v.* Cook, 60 Mo. 391; Carrier *v.* Dorrance, 19 S. C. 30.

5 Mooers *v.* Larry, 15 Gray, 451; West *v.* Blackshaer, 20 Fla. 457.

6 Eastman *v.* Sanborn, 3 Allen, 594; 81 Am. Dec. 774.

7 Thompson *v.* Harlow, 31 Ga. 348.

impliedly engages to perform his undertaking in a skillful and workmanlike manner. By the very act of receiving them for the purpose, he impliedly agrees that he has the requisite skill, and that he will use it.[1] But this is not the whole of his undertaking; he is not only obliged to perform his work in a workmanlike manner, but since he is entitled to a reward, either by express bargain or by implication, he must also take ordinary care of the thing bailed to him.[2]

He is not answerable if the thing bailed be lost, destroyed or injured without his fault; that is to say, he is not responsible for the loss or injury, provided he has exercised the same degree of diligence in respect to it which the generality of mankind use in keeping and guarding their own goods. In cases of loss by internal decay, robbery, theft, fire, superior force or other casualty, his liability depends upon the settlement of the question of fact, namely, whether the loss was caused by his failure to exercise the requisite care and diligence. He is not answerable for the direct and natural consequences flowing from causes like these; but he is sometimes responsible for them where he has given occasion to the loss or injury by omitting to provide against them, or by conduct which subjects the property to the hazard of such perils and dangers.[3] A watchmaker, for example, who receives a watch to repair, is bound to use ordinary diligence in its safekeeping; if the watch, while in his custody, is stolen through his negligence, he will be liable.[4] He must

1 Laws. Contr. § 58; Keith *v.* Bliss, 10 Ill. (App.) 424.

2 Smith *v.* Meegan, 22 Mo. 150; 64 Am. Dec. 259; Halyard *v.* Dechelman, 29 Mo. 459; 77 Am. Dec. 585; Hillyard *v.* Crabtree, 11 Tex. 264; 62 Am. Dec. 475; Russell *v.* Koehler, 66 Ill. 459; Spangler *v.* Eicholtz, 25 Ill. 297; Gamber *v.* Wolaver, 1 Watts & S. 60; McCaw *v.* Kimbrel, 4 McCord, 220; Chambers *v.* Crawford, Addis. 151; Kelton *v.* Taylor, 11 Lea, 264; 47 Am. Rep. 284; Gleason *v.* Beers, 59 Vt. 589; 59 Am. Rep. 757; Penn. Canal Co. *v.* Burd, 90 Pa. St. 281; Foster *v.* Taylor, 2 Brev. 348.

3 Edw. Bail, § 375.

4 Halyard *v.* Dechelman, 29 Mo. 459; 77 Am. Dec. 585.

at least, take the same care of the bailed property as he does of his own. In an old case, A intrusted B, a chronometer-maker, with a chronometer to be repaired, and B suffered his servant to sleep in the shop in which the chronometer was deposited. B was held liable to A for its value, B's servant having stolen it, and B, at the same time when the theft was committed, having deposited his watches in a more secure place than that in which the chronometer was left.[1]

(c). *Hire of Care or Custody.*

§ 44. **The General Principle.**—Where one person deposits his goods with another, and pays a consideration for the custody of them, the contract being mutually beneficial to the parties, the bailee must answer for ordinary neglect. The fact that he receives a reward binds him to a diligence increased beyond that of the mere depositary; while the service he renders to the owner of the goods, in keeping and guarding them, brings him under a less stringent obligation than that which rests upon one who borrows the use of a chattel, without rendering any sort of recompense for it. He is responsible for the exercise of ordinary diligence, *i. e.*, he is bound to take that care of the goods intrusted to him which every person of common prudence, and capable of governing a family, takes of his own concerns.[2]

There is no term known to the law as descriptive of the bailee of this character, except in some special branches of the service, such as that carried on by the agister, the liverystable-keeper, the warehouseman and the wharfinger, and in more modern times, by the

1 Clark *v.* Earnshaw, Gow., 93.

2 See cases *post*; Wadsworth *v.* Alcott, 6 N. Y. 64; Buckley *v.* Andrews, 39 Conn. 71; Kant *v.* Kessler, 114 Pa. St. 603

stock-yards corporation[1] and the safe deposit company.[2]

Public officers, a part of whose duties is to take care of chattels in their hands, are bailees for hire of this character.[3] So, one who receives money, as the treasurer of an association, by whose rules he is to pay over all moneys within a prescribed time, does not violate such obligation if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence, and without fault of his own; such obligation being that only of a bailee.[4]

§ 45. **The Agister.** —If a man take in a horse, or other cattle, to graze and pasture in his grounds, which the law calls agistment, he is (unless it is clear that it is a gratuitous taking), a bailee for hire, and bound to use ordinary care in their keeping.[5] He is not responsible if they be stolen from the field; but if he leave open the gates of his field, or neglect to keep his fences safe, in consequence of which neglect they stray and are stolen, the owner has an action against him, for this is negligence on his part.[6] The same conclusion was reached where the agister turned a colt into a field in which there was a bull.[7] And if he has agreed to drive the cattle from one place to another, he is bound to exercise the same degree of care and diligence that

1 Del. etc. R. Co. *v.* Central Stock Yards Co. 43 N. J. Eq. 71.

2 Safe Deposit Co. *v.* Pollock, 85 Pa. St. 391; 27 Am. Rep. 660.

3 Cross *v.* Brown, 41 N. H. 283; Witowski *v.* Brennan, 41 N. Y. (S. C.) 284; Blake *v.* Kimball, 106 Mass. 115; Aurentz *v.* Porter, 56 Pa. St. 115; Burke *v.* Trevet, 1 Mason, 96.

4 Walker *v.* British Guarantee Association, 18 Q. B. 277; 16 Jur. 885; 21 L. J. Q. B. 257.

5 Smith *v.* Cook, 1 Q. B. Div. 79; McCarthy *v.* Wolfe, 40 Mo. 520; Halty *v.* Markel, 44 Ill. 225; 92 Am. Dec. 182; Eastman *v.* Patterson, 38 Vt. 146; Searle *v.* Laverick, L. R. 9 Q. B. 122; Swann *v.* Brown, 6 Jones, 150; 72 Am. Dec. 568; Owens *v.* Geiger, 2 Mo. 39; 22 Am. Dec. 435; Sargent *v.* Slack, 47 Vt. 674; 19 Am. Rep. 137; Rey *v.* Toney, 24 Mo. 600; 69 Am. Dec. 444; Race *v.* Hansen, 12 Ill. (App.) 605.

6 Cecil *v.* Prench, 4 Martin, N. S. 256; 16 Am. Dec. 171; Umlauf *v.* Bassett, 38 Ill. 96; Winston *v.* Taylor, 28 Mo. 82; 75 Am. Dec. 112.

7 Smith *v.* Cook, 1 Q. B. Div. 79.

men of common prudence, engaged in driving their own cattle over similar routes, ordinarily exercise.[1] An agister must notify his customers of any unusual risk to which their cattle are exposed in his pasture ground.[2]

§ 46. **The Liveryman.**—One who takes a horse to keep and feed, as a liverystable-keeper, is liable for ordinary negligence only.[3] A liverystable-keeper has been adjudged guilty of negligence when he permitted a stranger to enter the stable at night to take out his horse, and did not see that the door was closed, whereby the bailor's horse escaped and was lost;[4] when he knowingly hitched the horse near another horse which he knew to be addicted to kicking;[5] when knowing the horse to be sick, he neither furnished it with proper treatment, nor notified its owner;[6] when he permitted drunken men, with pipes and matches, to spend the night in the hay loft, and the stable was burned.[7]

§ 47. **The Warehouseman.**—A warehouseman, or depositary of goods for hire, is bound only for ordinary care, and is not liable for a loss arising from accident where he is not in default; and he is not in default when he exercises such due and common diligence in the care of goods intrusted to him as the ordinary man bestows in the care of his own.[8] The law does not require him

1 Maynard *v.* Buck, 100 Mass. 45; see Newton *v.* Pope, 1 Cow. 109.

2 McLain *v.* Lloyd, 5 Phila. 195.

3 Dennis *v.* Huyck, 48 Mich. 620; 42 Am. Rep. 479; 12 N. W. Rep. 878.

4 Swann *v.* Brown, 6 Jones, 150; 72 Am. Dec. 568.

5 Clary *v.* Willey, 49 Vt. 55.

6 Hexamer *v.* Southal, 49 N. J. (L.) 682; 10 Atl. Rep. 281.

7 Eaton *v.* Lancaster, 79 Me. 477; 10 Atl. Rep. 449.

8 Chase *v.* Washburn, 1 Ohio St. 244; 59 Am. Dec. 623; Cailiff *v.* Danvers, Peake, 155; Batut *v.* Hartley, L. R. 7 Q. B. 594; Moulton *v.* Phillips, 10 R. I. 218; 14 Am. Rep. 663; Myers *v.* Walker, 31 Ill. 353; Morehead *v.* Brown, 6 Jones, 367; Titsworth *v.* Winnegar, 51 Barb. 148; Vincent *v.* Rather, 33 Tex. 77; 98 Am. Dec. 516; Jones *v.* Hatchett, 14 Ala. 743; Norway Plains Co. *v.* R. R. Co., 1 Gray, 263; 61 Am. Dec. 423; Platt *v.* Hibbard, 7 Cow. 497; Schmidt *v.* Blood, 9 Wend. 268; 24 Am. Dec. 143; Knapp *v.* Curtis, 9 Wend. 60; Arent *v.* Squire, 1 Daly, 350; Madan *v.* Covert, 42 N. Y. Sup. Ct. 135; Ducker *v.* Barrett, 5 Mo. 97; Cowles *v.* Pointer, 26

to construct his buildings secure from all possible contingencies; if they are reasonably and ordinarily safe against ordinary and common occurrences, it is sufficient.[1] As in all bailments, the nature and value of the property affect the question of ordinary care. The warehouseman is not expected to take the same care of a bag of oats as of a bag of money; of a bale of cotton as of a box of jewelry; of a load of wood as of a box of valuable paintings;[2] of a quantity of pig-iron as of a bale of hemp in wet weather.[3] But one who delivers to him a small quantity of a thing has the right to expect the same care as a large quantity of the same thing would receive.[4] He is not liable for any injury to the stored goods by rats or other vermin,[5] though it seems to be expected of him that he shall keep about the premises a cat[6] or a terrier dog.[7] The warehouseman was held to be guilty of negligence where, having received bales of cotton to store, the covers being torn, he left them in an open lot of ground so exposed that the under bales sunk into the mud and were damaged,[8] where with other goods in the same

Miss. 253; Holtzclaw *v.* Duff, 27 Mo. 392; Claflin *v.* Meyer, 75 N. Y. 260; 31 Am. Rep. 467; Foote *v.* Storrs, 2 Barb. 328; Brown *v.* Hitchcock, 28 Vt. 452; Neal *v.* R. R. Co., 8 Jones, 482; Spangler *v.* Eicholtz, 25 Ill. 297; Taylor *v.* Secrist, 2 Disn. 299; Buckingham *v.* Fisher, 70 Ill. 121; Hatchett *v.* Gibson, 13 Ala. 587; McCullom *v.* Porter, 17 La. Ann. 89; Armfield *v.* Humphrey, 12 Ill. (App.) 90; Wilson *v.* R. Co., 62 Cal. 164; Hamilton *v.* Elstner, 24 La. Ann. 455; Schwartz *v.* Baer, 21 La. Ann. 601; Irons *v.* Kentner, 51 Ia. 88; 33 Am. Rep. 119; 5 N. W. Rep. 73; Lamare *v.* London etc. Docks Co., 39 L. T. (N. S.) 330; Turrantine *v.* R. Co., 100 N. C. 375; 6 Am. St. Rep. 602; 6 S. E. Rep. 116; Bogert *v.* Haight, 20 Barb. 251; Dimmick *v.* R. R. Co., 18 Wis. 471; Macklin *v.* Frazier, 9 Bush, 3; Moose *v.* Mayor, 1 Stew. 284; Cincinnati etc. R. R. Co. *v.* McCool, 26 Ind. 140; Smith *v.* Simms, 51 How. Pr. 305; Backus *v.* Start, 13 Fed. Rep. 67; McCarthy *v.* R. R. Co., 30 Pa. St. 69; Madan *v.* Cover, 13 Jones & S. 245; Aldrich *v.* R. R. Co., 100 Mass. 31; 97 Am. Dec. 74. Warehousemen have in late years been held to be carrying on a public business so far as to be subject to public regulation and control. Munn *v.* People, 94 U. S. 113; Nash *v.* Page, 80 Ky. 539; 44 Am. Rep. 490.

1 Cowles *v.* Pointer, 26 Miss. 253.

2 Hatchett *v.* Gibson, 13 Ala. 587; Brown *v.* Hitchcock, 28 Vt. 452.

3 Holtzclaw *v.* Duff, 27 Mo. 392.

4 Hatchett *v.* Gibson, 13 Ala. 587.

5 Story Bail. § 444.

6 Cailiff *v.* Danvers, 1 Peake, 155.

7 Taylor *v.* Secrest, 2 Disney, 299.

8 Morehead *v.* Brown, 6 Jones, 367.

warehouse, he stored large quantities of gunpowder,[1] and where the roof of the warehouse, being allowed to remain overloaded with snow, fell in.[2]

The principle is well stated in a New York case,[3] where a quantity of cigars, having been stolen from a warehouse, and the contention of the plaintiff being that there was neglect on the part of the defendant in properly securing and guarding it, the jury were told: "In determining the means used in protecting goods stored against loss, they were not to occupy their time in endeavoring to find out in what form the highest exertion of the most acute intellect and experience would enable a man to devise means to protect goods in a warehouse against danger, but to determine what a man would do in the exercise of ordinary prudence to protect his property. They must be careful not to say at once, 'Such and such things ought to have been done,' because they were suggested or then suggested themselves to them, but reflect what a merely ordinarily prudent man would do in taking charge of property of this kind, and therefore to determine whether this warehouse was put in proper condition, such as a prudent man taking care of his own goods in his own warehouse, would have put it, who guarded and cared for his own property. If there is extra precaution that a prudent man would use as to fastenings, or as to the use of fence, watch-dogs, or private watchmen outside, it was for them to say whether these were such things as a prudent man would use in ordinary cases, and whether the want of such safeguards was the cause of the abstraction of the goods." In a Kentucky case, where a person storing salt for another did so so ineffec-

1 White *v.* R. Co., 5 Dill. 488; 3 McCrary, 559.

2 Moulton *v.* Phillips, 10 R. I. 218; 14 Am. Rep. 663.

3 Schwerin *v.* McKie, 51 N. Y. 180; 10 Am. Rep. 581.

tually that fifty barrels a week were rolled out and taken by thieves—240 being gone before the theft was discovered,[1] he was properly held liable.

§ 48. **The Wharfinger.**—A warehouseman is a person who receives goods and merchandise into his warehouse to be stored for hire; a wharfinger is one who owns or keeps a wharf, for the purpose of receiving and shipping merchandise to or from it, for hire.[2] In some instances, the wharfinger being the owner of a warehouse on the wharf, assumes also the duties and the character of a warehouseman, and his responsibilities are the same.[3] In a Pennsylvania case, the court say: "Defendant was a wharfinger, ... a bailee for hire, and by general engagement, liable to extend over plaintiff's lumber, like that of others, ordinary care and protection. What is meant by ordinary care was properly explained and defined. It is such as the generality of mankind use in their own affairs. This is required when the contract of bailment, express or implied, is reciprocally beneficial. This kind of care and skill is by law required of all persons employed in any business."[4]

(d). *The Hire of Carriage.*

§ 49. **The Private Carrier.**—A person whose trade is not that of conveying goods from one place or person to another, may, nevertheless, upon occasion, undertake to carry the goods of another, and receive a reward for so doing. Such a person is a private carrier,[5]

1 Chenowith *v.* Dickinson, 8 B. Mon. 156.

2 Edw. Bail. 198.

3 Buckingham *v.* Fisher, 70 Ill. 121; Parker *v.* Lombard, 100 Mass. 405; Howell *v.* Morton, 78 Ill. 162; Reamer *v.* Davis, 85 Ind. 201; Sideways *v.* Todd, 2 Stark, 400; Cox *v.* O'Riley, 4 Ind. 368; 58 Am. Dec. 633; Foote *v.* Storrs, 2 Barb. 326; Platt *v.* Hibbard, 7 Cow. 497; Blin *v.* Mayo, 10 Vt. 56; 33 Am. Dec. 175; Merchants' Wharfboat Ass'n *v.* Wood, 64 Miss. 661; 60 Am. Rep. 76; 2 South. Rep. 76.

4 Rodgers *v.* Stophel, 32 Pa. St. 115; 72 Am. Dec. 775.

5 Browne Carr, § 32.

and like other bailees for hire, is responsible for ordinary negligence[1] which we have seen is the absence of ordinary diligence, which, again, is that amount of care which a prudent man ordinarily takes of his own goods or his own business.[2]

The responsibility of a common carrier is, as we shall see, much greater, but it is only necessary to say here that one, though he may carry the goods of another, is not liable as a common carrier, unless he was under a legal obligation to accept the goods and carry them, and would have been liable to an action if, without reasonable excuse, he had refused to receive them; and that he could not be liable to an action unless he had expressly and publicly offered to carry for all persons indifferently, or had, by his conduct and in the manner of conducting his business, held himself out as ready to carry for all.[3]

1 Story Bail., § 444; Forsythe *v.* Walker, 9 Pa. St. 148; Pennewill *v.* Cullen, 5 Harr. (Del.) 238; White *v.* Bascom, 28 Vt. 268; Baird *v.* Daly, 57 N. Y. 236; 15 Am. Rep. 488; Bush *v.* Miller, 13 Barb. 488; Powers *v.* Mitchell, 3 Hill, 545; Roberts *v.* Turner, 12 Johns, 232; 7 Am. Dec. 311; Dillon *v.* R. R. Co., 1 Hilt., 231; Brown *v.* Denison, 2 Wend. 593; Platt *v.* Hibbard, 7 Cow. 497; Stannard *v.* Prince, 64 N. Y. 300; Holtzclaw *v.* Duff, 27 Mo. 392.

2 Browne Carr, § 33; Shaw *v.* R. Co., 8 Gray, 45.

3 See *post;* Varble *v.* Bigley, 14 Bush, 698; Fish *v.* Clark, 2 Lans., 178; 49 N. Y. 122; Allen *v.* Sackrider, 37 N. Y. 341.

CHAPTER VII.

THE MUTUAL BENEFIT BAILMENT (CONTINUED) THE PLEDGE.

SECTION 50. Pledge Defined.
51. Distinction between Pledge and Chattel Mortgage.
52. What may be Pledged.
53. The Pledged Thing.
54. The Pledgor's Title.
55. The Debt or Engagement.
56. The Increase and Profits.
57. The Pledgee's Right of Transfer.
58. The Pledgee's Duties in Regard to the Pledge.
59. The Pledge an Additional Remedy.
60. The Right to Redeem.
61. The Pledgee's Duty to Re-deliver.
62. The Pledgee's Right to Sell on Default.
63. Pledgee Cannot Purchase.
64. Irregular Sale may be Ratified.
65. Power to Sell not Mandatary.
66. Pledgee not Liable for Consequences of Sale, When.
67. The Pledgor's Right to the Surplus.
68. The Pledgee's Right of Action.
69. The Pledgor's Right of Action.
70. The Pledge, How Extinguished.
71. Effect of Death of Either Party.

§ 50. **Pledge Defined.** — A pledge or pawn is the bailment of a chattel as security for some debt or engagement.[1] Both the terms *pignus* and *vadium* were used in the Latin, the former, it seems, having the

1 Laws. Rights, Rem. & Pr., § 1751. Mr. Edwards defines pledge (Bail. § 188) as something put in pawn or deposited with another as security for the repayment of money borrowed, or for the performance of some agreement or obligation; it is legally defined to be a bailment of goods by a debtor to his creditor to be kept till the debt is discharged. Lord Holt, in Coggs. *v.* Bernard, says: the fourth sort of bailments is when goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or pledge. Chancellor Kent calls it a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt be discharged.

wider meaning of anything given as security for an obligation—as, for example, hostages for the performance of the stipulations of a treaty. The word *Pawn*, in our language, has an "unpleasant savor," and the word *Pledge*, or in more recent transactions, *Collateral Security*, though all three are synonymous in legal meaning, is mostly used to describe this particular transaction at the present day.[1]

§ 51. **Distinction Between Pledge and Chattel Mortgage.**—A pledge differs from a chattel mortgage in two respects:

1. The title to the thing delivered in pledge does not pass as it does in the case of a chattel mortgage, this, as we have seen, being the characteristic feature of all bailments.[2] The delivery is made as a security for the

1 Stearns *v.* Marsh, 4 Denio, 227; 47 Am. Dec. 248. Says Mr. Schouler: "The terms 'pawn' and 'pledge' in our language appear interchangeable, and law-writers so employ them: See 2 Bla. Com. § 157; 3 Bla Com. §§ 274, 280. But 'pawn,' which is the more characteristic of the particular transaction, and was almost always applied in the humbler days of this bailment, keeps its unpleasant savor; for the modern disposition has been to use in its stead 'pledge,' a term admitting of various senses, some of them truly Norman, where the transaction may be detached from the three golden balls. And, once more, commercial paper and personalty of other incorporeal kinds are now found so highly convenient for pledge, that brokers and bankers have put us lately to using still another term, that of 'collateral security.' We may find this third expression used in some of the late reports in an uncertain way, as though courts were bewildered in distinguishing between the pledge and chattel mortgage: Fraker *v.* Reeve, 36 Wis. 85; Smithurst *v.* Edmunds, 14 N. J. Eq. 408; First Nat. Bank *v.* Kelly, 57 N. Y. 34. From some judicial expressions, one might infer that a transfer by way of collateral security was thought something altogether distinct from a pledge: See Coulter, J., in Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120. But the better view is that 'collateral security' embraces, in the broadest sense, both pledge and chattel-mortgage transactions, while more appropriately applied to the former class, and in the strict phrase to pledges of incorporeal personalty alone. 'Collateral security' is certainly the most patrician of expressions applied to the present bailment. And now that pledge may be made of great things as well as small, of mercantile as well as household articles, the capitalist who advances money on staple merchandise, bonds, or commercial paper, refuses blood-brotherhood with the primitive lender upon garments, furniture, and personal ornaments; and while the pawnbroker still plies, under license, the individual trade with misery and humble station, a corporation, organized for a wider reach of the same business, sinks the pawn, and is styled a 'collateral loan company,' or 'merchandise security bank.'" Schoul. Bail. § 159.

2 Brown *v.* Bement, 8 Johns, 96; Parks *v.* Hall, 2 Pick. 211; Langdon *v.* Buel, 9

payment of a debt, or for the performance of some other act; and the party making the delivery retains a power of redemption. In a chattel mortgage, the title is conveyed, subject to the condition of a defeasance in case of payment; whilst the title to goods deposited in pledge remains in the person making the deposit, only a special property passing to the pledgee.[1] If the pledge is not redeemed by the time stipulated, it does not become the property of the pledgee, but the latter is obliged to take legal proceedings to obtain authority to dispose of it, or he must sell it with certain formalities for the account of the pledgor.[2]

2. In a mortgage, the chattels mortgaged need not be delivered to the mortgagee, but may, as they usually do, remain in the hands of the mortgagor.[3] In a pledge, however, delivery of the thing pledged is essential,[4] either to the pledgee or to a third person for

Wend. 80; Patchin *v.* Pierce, 12 Wend. 61; Ackley *v.* Finch, 7 Cow. 290; Atwater *v.* Mower, 10 Vt. 75; Parshall *v.* Eggart, 52 Barb. 367; Ash *v.* Savage, 5 N. H. 545; Heyland *v.* Badger, 35 Cal. 404. "A radical distinction between a pledge and a mortgage is, that by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition, but in case of a pledge the pledgor retains the general title in himself, and parts with the possession for a special purpose": Walker *v.* Staples, 5 Allen, 34.

1 Cortelyou *v.* Lansing, 2 Caines Cas 200; Brownell *v.* Hawkins, 4 Barb. 491; Badlam *v.* Tucker, 1 Pick. 397; 11 Am. Dec. 202; Brewster *v.* Hartley, 37 Cal. 15; 99 Am. Dec. 237; Dewey *v.* Bowman, 8 Cal. 145; Garlick *v.* James, 12 Johns. 146; 7 Am. Dec. 294; Sims *v.* Canfield, 2 Ala. 555; Barrow *v.* Paxton, 5 Johns. 258; 4 Am. Dec. 354; McLean *v.* Walker, 10 Johns. 471; Eastman *v.* Avery, 23 Me. 248; Day *v.* Swift, 48 Me. 368; Gleason *v.* Drew, 9 Me. 82; Conard *v.* Atlantic Ins. Co., 1 Pet. 449; Gay *v.* Moss, 35 Cal. 125; Haven *v.* Low, 2 N. H. 13; 9 Am. Dec. 25; Harris *v.* Lombard, 60 Miss. 29; Dewey *v.* Bowman, 8 Cal. 145; Belden *v.* Perkins, 78 Ill. 449; Wilkie *v.* Day, 141 Mass. 68. 6 N. E. Rep. 542.

2 See *post*, § 62.

3 Edw. Bail. § 189; Story Bail., § 287; Schoul. Bail. §§ 162, 163; Holmes *v.* Crane, 2 Pick. 610; Langdon *v.* Buel, 9 Wend. 80.

4 Brewster *v.* Hartley, 37 Cal. 25; 99 Am. Dec. 237; Wilson *v.* Little, 2 N.Y. 447; 51 Am. Dec. 307; Goldstein *v.* Hort, 30 Cal. 372; Homes *v.* Crane, 2 Pick. 610; Bonsey *v.* Amee, 8 Pick. 236; Pinkerton *v.* R. R. Co., 42 N. H. 421; Owens *v.* Kinsey, 7 Jones, 245; Beeman *v.* Lawton, 37 Me. 543; Casey *v.* Cavaroc, 96 U. S. 467; Fletcher *v.* Howard, 2 Aiken, 115; 16 Am. Dec. 686; Lucketts *v.* Townsend, 3 Tex. 119; 49 Am. Dec. 723; First Nat. Bank *v.* Nelson, 38 Ga. 391; 95 Am. Dec. 400; Nevan *v.* Roup, 8 Iowa, 207; Walcott *v.* Keith, 22 N. H. 196; Propst *v.* Roseman, 4 Jones, 130; Haskins *v.* Patterson, 1 Edm. Sel. Cas. 120; Ceas *v.* Bramley, 18 Hun, 187; Corbett *v.* Underwood, 83 Ill. 324; 25 Am. Rep. 392; Wright *v.* Ross, 36 Cal. 414; Smyth *v.* Craig, 3 W. & S. 14.

him.[1] Though an agreement to give property in pledge is valid between the parties, and may be enforced by specific performance in some cases, and if not performed, will always give a right to damages for its breach, yet until the delivery is made, intervening rights will have priority over the pledgee—such as attaching or execution creditors of the intended pledgor, or his general creditors if he meantime dies insolvent, or is forced into bankruptcy.[2] And though the old rule was that property not in existence, but merely in expectancy, could not be the subject of a pledge,[3] such attempts to pledge are now upheld as executory agreements to be performed when the things do come into existence.[4]

Incorporeal property, however, which is incapable of manual delivery, may, nevertheless, be pledged; and in such case, the transfer of the interest may be made in such way as is possible.[5] "It has been doubted whether incorporeal things, like debts, money in stocks, etc., which cannot be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever, in personal property, may not be pledged; provided the interest can be put, by actual delivery, or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt.

1 Brown *v.* Warren, 43 N. H. 430.

2 Schoul. Bail. § 179; City Fire Ins. Co. *v.* Olmstead, 33 Conn. 476; Siedenbach *v.* Riley, 111 N. Y. 560; Gettings *v.* Nelson, 86 Ill. 591. In Parshall *v.* Eggert, 54 N. Y. 18, it is said that it is only a creditor who acquires a specific right to or lien on the thing pledged, who may prevent the pledgee's interest in an undelivered chattel from attaching.

3 Edw. Bail. § 193; Story Bail. § 294; Bousey *v.* Amee, 8 Pick. 236; Strickland *v.* Turner, 7 Ex. 208; Smithurst *v.* Edmunds, 14 N. J. Eq. 408.

4 Waldie *v.* Doll, 29 Cal. 555; Smithurst *v* Edmunds, *supra*; Macomber *v.* Parker, 14 Pick. 497; Collins Appeal, 107 Pa. St. 590; 52 Am. Rep. 479; Smith *v.* Atkins, 18 Vt. 461.

5 Brewster *v.* Hartley, 37 Cal. 25; 99 Am. Dec. 237; Welch *v.* Mandeville, 1 Wheat. 236; Goldstein *v.* Hort, 30 Cal. 376; Hasbrouck *v.* Vandervoort, 4 Sandf. 78.

Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge. The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws."[1]

And a constructive delivery will always do, as for example, the delivery of the receipt of a warehouseman,[2] or other bailee,[3] of the pledged property in his custody; the transfer of the bill of lading of the goods,[4] or the delivery of a bank book containing a statement of the amount of the pledged deposit.[5] Whatever, in short, will in the eye of the law, be considered sufficient to transfer the possession of the property, is enough.[6] The property may be too bulky for manual delivery, in which case a symbolical delivery is sufficient.[7] And

1 Wilson *v.* Little, 2 N. Y. 447; 51 Am. Dec. 307; Nisbet *v.* Trust Co., 4 Woods 464.

2 British Columbia Bk. *v.* Marshall, 8 Sawy. 29; St. Louis Bk. *v.* Ross, 9 Mo. (App.) 399.

3 Cartwright *v.* Wilmerding, 24 N. Y. 521; Whitney *v.* Tibbetts, 17 Wis. 359; Bank of Rochester *v.* Jones, 4 N. Y. 497; 55 Am. Dec. 290.

4 Cartwright *v.* Wilmerding, 24 N. Y. 521; Tibbetts *v.* Flanders, 18 N. H. 284; Whitney *v.* Tibbetts, 17 Wis. 359; Nevan *v.* Roup, 8 Iowa, 207; Dows *v.* National Ex. Bank, 91 U. S. 618; First Nat. Bank *v.* Kelly, 57 N. Y. 34; Pettit *v.* First Nat. Bank, 4 Bush, 334; Meyerstein *v.* Barber, L. R. 2 Com. P. 38; 4 H. L. Cas. 317; Muller *v.* Pondir, 6 Lans. 480.

5 Boynton *v.* Payrow, 67 Me. 587.

6 Story Bail. § 277; Sumner v. Hamlet, 12 Pick. 76; Tibbetts *v.* Flanders, 18 N. H. 284; Desha *v.* Pope, 6 Ala. 690; 41 Am. Dec. 76; Parsons *v.* Overmire, 22 Ill. 58; Heard *v.* Brewer, 4 Daly 136.

7 As, for example, pointing out to the pledgee a number of logs in a river as the pledged property. Jewett *v.* Warren, 12 Mass. 300; 7 Am. Dec. 74. Or the delivery of a key of a warehouse. Whittaker *v.* Sumner, 20 Pick. 405.

where the pledgee has the thing already in possession in another character, the contract of pledge transfers to him possession as pledgee by operation of law.[1]

§ 52. **What May be Pledged.**—Every kind of personal property, corporeal or incorporeal, capable of transfer by delivery of the thing itself, or by an assignment of a written evidence of its existence, may be the subject-matter of a pledge.[2] The ordinary chattels personal, *i. e.*, those articles which the owner may carry with him from place to place, which may be vended, worn or consumed, the horse in his stable, or the sheep in his pasture; the stove in a man's house, or the books in his office; the ring on his finger, or the watch in his pocket; the goods on his shelves, or the money in his till—these, and all things like them may be pledged.[3] So may bills of exchange, and promissory notes,[4] bonds,[5] and certificates of stock,[6] chattel mortgages,[7] deposits in bank,[8] insurance policies (fire, life, or marine),[9] judgments,[10] leases,[11] mortgages,[12] and title deeds.[13]

1 Story Bail. § 297; Cushman *v.* Hayes, 46 Ill. 145; Smith *v.* Mott, 76 Cal. 171.

2 Laws. Rights, Rem. & Pr. § 1756.

3 Laws. Rights, Rem. & Pr. § 1339; Houser *v.* Kemp, 3 Pa. St. 209; Stearns *v.* Marsh, 4 Denio, 227; 47 Am. Dec. 248; Frost *v.* Shaw, 3 Ohio St. 270.

4 Williamson *v.* Culpepper, 16 Ala. 211; 50 Am. Dec. 175; Appleton *v.* Donaldson, 3 Pa. St. 381; White *v.* Phelps, 14 Minn. 27; Louisiana State Bank *v.* Gareunie, 21 La. Ann. 555; Garlick *v.* James, 12 Johns. 146; 7 Am. Dec. 294; McLean *v.* Walker, 10 Johns. 471; Bowman *v.* Wood, 15 Mass. 534.

5 Strong *v.* National Bank Ass'n, 45 N. Y. 718; Loomis *v.* Stave, 72 Ill. 623; Ringling *v.* Kohn, 4 Mo. App. 59; Morris Canal Co. *v.* Lewis, 12 N. J. Eq. 323; White Mountain R. R. Co. *v.* Bay State Iron Co., 50 N. H. 57; Potter *v.* Thompson, 10 R. I. 1; Talty *v.* Freedmen's Sav. Inst. 93 U. S. 321.

6 Jarvis *v.* Rogers, 13 Mass. 105; 15 Mass. 389; Hasbrouck *v.* Vandervoort, 4 Sand. 74; Brewster *v.* Hartley, 37 Cal. 16; 99 Am. Dec. 237; Wilson *v.* Little, 2 N. Y. 443; 51 Am. Dec. 307; Heath *v.* Silverthorn Co., 39 Wis. 147; Worthington *v.* Towney, 34 Md. 182; Pinkerton *v.* R. R., 42 N. H. 424; Conyngham's Appeal, 57 Pa. St. 474; Thompson *v.* Toland, 48 Cal. 99; Fisher *v.* Brown, 104 Mass. 259; 6 Am. Rep. 235; Rozet *v.* McClellan, 48 Ill. 345; 95 Am. Dec. 551; Markham *v.* Jaudon, 41 N. Y. 235.

7 Franker *v.* Reeve, 36 Wis. 35; Jerome *v.* McCarter, 94 U. S. 734.

8 Boynton *v.* Payrow, 67 Me. 587.

9 Soule *v.* Union Bank, 45 Barb. 111; West *v.* Carolina Ins. Co., 31 Ark. 476; Merrifield *v.* Baker, 9 Allen, 29; Bruce *v.* Garden, L. R. 5 Ch. 32; Edwards *v.* Martin, L. R. 1 Eq. 121; Latham *v.* Chartered Bank, L. R. 17 Eq. 205; Wells *v.* Archer, 10 Serg. & R. 412; 13 Am. Dec. 682; Luckey *v.* Gannon, 37 How. Pr. 134; Boardman *v.* Holmes, 124 Mass. 438.

10 Hanna *v.* Holton, 78 Pa. St. 334; 21 Am. Rep. 20.

11 Dewey *v.* Bowman, 8 Cal. 145.

12 Campell *v.* Parker, 9 Bosw. 322; Jerome *v.* McCarter, 94 U. S. 734; Wright *v.* Ross, 36 Cal. 414; Ponce *v.* McElvy, 47 Cal. 154.

13 *re* Kerr, L. R. 8 Eq. 331.

The exception is that small class of property which, on grounds of public policy, cannot be the subject of contract, whether of sale or assignment,[1] as for example, the salary of a public officer[2] or a cause of action growing out of a personal wrong.[3]

§ 53. **The Pledged Thing.**—The pledge is primarily a security for all owing by the pledgor to the pledgee, so that a part payment leaves it still a security for the rest.[4] Where, however, the pledge is made for a specific debt or purpose, it may be held for that alone[5] and cannot be retained for subsequent or other debts unless they were made upon the credit of the pledge, or such was the intention of the parties.[6] Several securities may be pledged for the same debt; in which case the creditor has the right to elect as to which he will enforce,[7] and is not obliged to proceed against a particular one, unless such has been the agreement of the parties.[8] Each is liable for the whole debt,[9] but if the sale of part satisfies the debt, the pledgee can proceed no further to sell the others.[10] And he may release one article or thing without releasing all.[11]

1 Laws. Contr., §§ 314, 315.

2 Story Bail., § 293; Schoul. Bail. § 170; Moffat *v.* Van Doren, 4 Bosw. 609.

3 Pindell *v.* Grooms, 18 B. Mon. 501.

4 Story Bail. § 301; Post *v.* Tradesman's Bank, 28 Conn. 420; Phillips *v.* Thompson, 2 Johns. Ch. 418; 7 Am. Dec. 535; Eichelberger *v.* Murdock, 10 Md. 373; 69 Am. Dec. 140.

5 Fridley *v.* Bowen, 103 Ill. 633; Wooley *v.* Louisville Bank, 81 Ky. 527; James, Appeal, 89 Pa. St. 54; Phillips *v.* Thompson, 2 Johns. Ch. 418; 7 Am. Dec. 535; St. John *v.* O'Connell, 7 Port. 466; Gilliat *v.* Lynch, 2 Leigh, 493; Duncan *v.* Brennan, 83 N. Y. 487; Wyckoff *v.* Anthony, 9 Daly, 417; Boughton *v.* U. S. 12 Ct. of Cl. 331; Dobree *v.* Norcliffe, 23 L. T. (N. S.) 552; Robinson *v.* Frost, 14 Barb. 536.

6 Post *v.* Tradesman's Bank, 28 Conn. 420; Teutonia Nat. Bank *v.* Loeb, 27 La. Ann. 110; Jarvis *v.* Rogers, 15 Mass. 389; Pettibone *v.* Griswold, 4 Conn. 158; 10 Am. Dec. 106; Van Blarcom *v.* Broadway Bank, 37 N. Y. 540.

7 Schoul. Bail. § 178; citing Union Bank *v.* Laird, 2 Wheat. 390; Cullum *v.* Emanuel, 1 Ala. 23; 34 Am. Dec. 757; Buchanan *v.* International Bank, 78 Ill. 500; Andrews *v.* Scotton, 2 Bland, 629; Balt. etc. Ins. Co. *v.* Dalrymple, 25 Md. 267; Baldwin *v.* Bradley, 67 Ill. 32.

8 Brick *v.* Freehold etc. Co., 37 N. J. L. 307; Comstock *v.* Smith, 23 Me. 202; Buchanan *v.* Int. Bank, 78 Ill. 500; Morris *v.* Fales, 43 Hun. 393.

9 Story Bail. § 314.

10 Newport etc. Bridge Co. *v.* Douglass, 12 Bush, 673; Rohile *v.* Stidger, 50 Cal. 207; Van Blarcom *v.* Broadway Bank, 37 N. Y. 540; Andrews *v.* Scotten, 2 Bland, 629; Jesup *v.* City Bank, 14 Wis. 331.

11 Story Bail. § 314.

§ 54. **The Pledgor's Title.**—A pledgor, like the ordinary vendor of chattels, impliedly warrants that he has title to the goods pledged.[1] If he undertake to pledge property that belongs to another, without his consent, he cannot afterwards, so long as the owner refrains from claiming it, seek to have it restored until his debt is discharged.[2] So, too, though he is not the owner at the time the pledge is made, if he subsequently acquire the property, by what title soever, his ownership will be deemed to relate back to the time of the contract, and the pledge will stand good.[3] While one may pledge whatever things belong to him in present possession, yet in regard to those things in which he has a property which may be divested, or which is subject to incumbrance, he cannot confer on the creditor, by the pledge, any further rights than he had himself. He pledges the interest which he possesses, subject to the superior right of the incumbrancer, or person who owns the reversionary interest in the subject of the bailment.[4] The exception to this, as well as to the case of the pledgor having no title at all, is negotiable paper with nothing on its face to put the pledgee on inquiry as to the true title.[5] It is essential that the person making a pledge of goods as security for a debt should own them,[6] or at least have authority to deposit them in pledge.[7] A thief,[8] a bailee,[9] or one hav-

1 Story Bail. § 354; Mairs *v.* Taylor, 40 Pa. St. 446; Goldstein *v.* Hort, 30 Cal. 372.

2 Goldstein *v.* Hort, 30 Cal. 372; Jarvis *v.* Rogers, 13 Mass. 105.

3 Edw. Bail. § 192; Goldstein *v.* Hort, *supra*; Parshall *v.* Eggart, 54 N. Y. 18.

4 Hoare *v.* Parker, 2 Term. Rep. 376; Story Bail. § 275; Dewey *v.* Bowman, 8 Cal. 145.

5 Story Bail. § 296; Fisher *v.* Fisher, 98 Mass. 303; Bealle *v.* Southern Bank, 57 Ga. 274; Francis *v.* Joseph, 3 Edw. Ch. 182; Coddington *v.* Bay, 20 Johns. 637; Payne *v.* Bensley, 8 Cal. 260; 68 Am. Dec. 318; Robinson *v.* Smith, 14 Cal. 98; Manning *v.* McClure, 36 Ill. 495; Naglee *v.* Lyman, 14 Cal. 454.

6 Story Bail. § 271; Edw. Bail. § 192.

7 Jarvis *v.* Rogers, 13 Mass. 105; Sweet *v.* Brown, 5 Pick. 178; Smith *v.* Mott, 76 Cal. 171; 18 Pac. Rep. 260; Wright *v.* Solomon, 19 Cal. 64; 79 Am. Dec. 197; Cox *v.* McGuire, 26 Ill. (App.) 315.

8 Packer *v.* Gillies, 2 Camp. 336.

9 Thrall *v.* Lathrop, 30 Vt. 307; 73 Am. Dec. 406.

ing only a qualified property in the goods,[1] cannot pledge them so as to affect the right of the true owner.

§ 55. **The Debt or Engagement.**—The debt or engagement for which, as security, the thing is delivered to the pledgee, may be that of the pledgor or of some third person.[2] It may be a general or a specific indebtedness, a debt now owing or to be created in the future,[3] or both,[4] or the pledge may be restricted to a portion of a present or future debt,[5] or to obligations for a fixed, or for an indefinite period.[6]

The pledge covers, or is security for, not only the debt itself, but interest upon it and necessary charges in its preservation or in realizing upon it.[7]

§ 56. **The Increase and Profits.**—The fruits or increase of the pledge are deemed a part of it, and belong to the pledgee, as the pledge does, as, for example, the young of a pledged animal,[8] the interest on pledged se-

1 Agnew *v.* Johnson, 22 Pa. St. 471; 62 Am. Dec. 303.

2 Story Bail. § 300; Schoul. Bail. § 171; Brick *v.* Freehold Co., 37 N. J. L. 307; Stewart *v.* Davis, 18 Ind. 74; Wilcox *v.* Fairhaven Bank, 7 Allen, 270; Blackwood *v.* Brown, 34 Mich. 4; Gilson *v.* Martin, 49 Vt. 474; Third Nat. Bank *v.* Boyd, 44 Md. 47; 22 Am. Rep. 35; Jewett *v.* Warren, 12 Mass. 300; 7 Am. Dec. 74. Where the owner of the pledged article is not the debtor he stands in the situation of a surety entitled on payment to be substituted to all the creditor's rights, and any change in the contract of suretyship which will discharge a surety will release and discharge the property so held as collateral. Price *v.* Dime Sav. Bank, 124 Ill. 317; 7 Am. St. Rep. 367; 15 N. E. Rep. 754.

3 Berry *v.* Gibbons, L. R. 8 Ch. 747; Eichelberger *v.* Murdock, 10 Md. 373; 69 Am. Dec. 140; Third Nat. Bank *v.* Boyd, 44 Md. 47; 22 Am. Rep. 35; Badlam *v.* Tucker, 1 Pick. 389; 11 Am. Dec. 202; Holbrook *v.* Baker, 5 Me. 309; 17 Am. Dec. 236; U. S. *v.* Neal, 14 Fed. Rep. 767; Vernon *v.* De Wolf, 4 Mason, 123; Blarcom *v.* Broadway Bk., 9 Bosw. 532.

4 Badlam *v.* Tucker, 1 Pick. 398; 11 Am. Dec. 202; Holbrook *v.* Baker, 5 Me. 309; 17 Am. Dec. 236; D'Wolf *v.* Harris, 4 Mass. 515; Conard *v.* Atlantic Ins. Co., 1 Pet. 448; Eichelberger *v.* Murdock, 10 Md. 373; 69 Am. Dec. 140.

5 Fridley *v.* Bowen, 103 Ill. 12.

6 United States *v.* Hooe, 3 Cranch, 73; Stearns *v.* Marsh, 4 Denio, 227; 47 Am. Dec. 248; Story Bail., § 300; Merchants Nat. Bk. *v.* Hall, 83 N. Y. 338; 38 Am. Rep. 434.

7 Story Bail., § 306; *In re* Kerr's Policy, L. R. 8 Eq. 331; Hurst *v.* Coley, 22 Fed. Rep. 183; Pickersgill *v.* Brown, 7 La. Ann. 298; Blake *v.* Paul, 29 Leg. Int. 366.

8 Story Bail., § 292; Schoul. Bail., § 170; Smith *v.* Atkins, 18 Vt. 461.

H. E. DAVIS

curities, or the dividends on pledged stock.[1] But the increase, fruits or profits are held by the pledgee as the thing itself is; he cannot appropriate them to his own use, and he is bound, on the contrary, to give an account of them to the debtor, or to deduct them from what may be due him.[2] If the profits of the pledge, while in the pledgee's hands, have been sufficient to discharge the debt, the pledgor is entitled to receive back the pledge intact.[3]

§ 57. **The Pledgee's Right of Transfer.**—Except under the power of sale on default, the pledgee has no right to alienate the pledge, beyond his interest in it.[4] His right of transfer is more extensive than that of other bailees, for he may make a bailment of it by delivering it into the hands of another for safe keeping, or he may pledge it for his own debt.[5] But such transfers are of his interest in the chattel only; for to attempt to pledge property beyond the pledgee's own demand, or to make transfer as though he were the absolute owner, is a breach of trust, and a fraud upon the original pledgor,[6] and can give no right to the transferee beyond that which the pledgee had, unless the pledgee had been held out as the pledgor's agent, or

1 Swasey *v.* R. R. Co., 1 Hughes, 17; Merrifield *v.* Baker, 9 Allen, 29; Herman *v.* Maxwell, 47 N. Y. (S. C.) 347; Gaty *v.* Holliday, 8 Mo. (App. 118). It is generally held that one to whom stock of a corporation is pledged may vote it. *Ex parte* Willcocks, 7 Cow. 402; 17 Am. Dec. 425; New York etc. R. R. Co. *v.* Schuyler, 38 Barb. 542, *per* Ingraham, J. But see McDaniels *v.* Flower Brook Manfg. Co., 22 Vt. 274. He is not entitled like the owner to notice of meetings of the corporation. *Id.*

2 Hunsaker *v.* Sturgis, 29 Cal. 142; Houton *v.* Halliday, 2 Murph. 111; 5 Am. Dec. 522; State *v.* Adams, 76 Mo. 605.

3 Geron *v.* Geron, 15 Ala. 558; 50 Am. Dec. 143.

4 Story Bail, § 322; Lucketts *v.* Townsend, 3 Tex. 119; 49 Am. Dec. 723.

5 Story Bail, §§ 314, 322-324; Mores *v.* Conham, Owen, 123; Whitaker *v.* Sumner, 20 Pick. 399; 2 Kent's Com. 579; Shelton *v.* French, 33 Conn. 489; Belden *v.* Perkins, 78 Ill. 449; Ashton's Appeal, 73 Pa. St. 143; Whitney *v.* Peay, 24 Ark. 22; Van Blarcom *v.* Broadway Bank, 37 N. Y. 540; First Nat. Bk. *v.* Root, 107 Ind. 224; 48 N. E. Rep. 105.

6 Story Bail. § 324; Gould *v.* Central Trust Co., 6 Abb. N. C. 381; Easton *v.* Hodges, 18 Fed. Rep. 677.

otherwise, the transferee had a right to assume he had authority.[1] The pledgee may assign the debt for which he holds a security in pledge, and transfer by actual delivery his interest in the goods bailed; so that the purchaser will acquire precisely the rights which he possessed, subject to the same obligations.[2] The pledgee, then, may assign his interest, without destroying the original lien, or giving the pledgor a right to reclaim on any other terms than he might before such assignment.[3] If, for example, a pledgee of stock pledged to him to secure a loan to the pledgor, pledges the stock to another for his own debt, the original pledgor cannot recover it without paying his debt.[4] And on the other hand, the original pledgor has a right to redeem it on payment of his own debt, and the second pledgee cannot hold it for more.[5]

It may be questioned whether, under some circumstances, and as to certain kinds of chattels whose intrinsic qualities were presumably regarded, such as a valuable work of art, or private garments, a fair construction of the pledge contract would admit of passing the custody on to strangers at all, at the mere dis-

[1] Crocker *v.* Crocker, 31 N. Y. 507; 88 Am. Dec. 291; Palmtag *v.* Doutrick, 59 Cal. 154; 43 Am. Rep. 245; 88 Am. Dec. 291; Ogden *v.* Lathrop, 65 N. Y. 158; Thompson *v.* Toland, 48 Cal. 99; Conyngham's Appeal, 57 Pa. St. 474; Merchants' Bank *v.* Livingston, 74 N. Y. 223; Prall *v.* Tilt, 27 N. J. Eq. 393; West Transfer Co. *v.* Marshall, 4 Abb. App. 575; Stone *v.* Brown, 54 Tex. 330; McNeil *v.* Tenth Nat. Bk., 46 N. Y. 325; 7 Am. Rep. 341. Negotiable paper transferred to a *bona fide* purchaser without notice is an exception to this rule: Story Bail. §§ 322. 323; Coit *v.* Humbert, 5 Cal. 260; 63 Am. Dec. 128; Morris Canal Co. *v.* Fisher, 9 N. J. Eq. 667; 64 Am. Dec. 423; Shaw *v.* Spencer, 100 Mass. 382; 97 Am. Dec. 107; Ashton *v.* Atlantic Bank, 3 Allen, 217. Stock, however, is not: McNeil *v* Tenth Nat. Bank, 40 Barb. 59; Ashton's Appeal, 73 Pa. St. 153. Story's statement of the law as different from this (Story Bail. § 322) is criticised by Mr. Schouler: (Bail. § 211.) See Little *v.* Barker, 1 Hoff. Ch. 487.

[2] Kemp *v.* Westbrook, 1 Vesey 178; Ratcliff *v.* Vance, 2 Const. (S. C.) 239; Macomber *v.* Parker, 14 Pick. 497; Hunt *v.* Holton, 13 Pick. 216.

[3] Bullard *v.* Billings, 2 Vt. 309; Macomber *v.* Parker, 13 Pick. 497; Hunt *v.* Holton, 12 Pick. 216; Ferguson *v.* Union Furnace Co., 9 Wend. 355.

[4] New York etc. R. Co. *v.* Davies, 38 Hun. 477; Bradley *v.* Parks, 83 Ill. 169.

[5] Torrey *v.* Harris, 12 Daly 385; Agnew *v.* Johnson, 22 Pa. St. 471; 62 Am. Dec. 303.

cretion of the pledgee, apart from his pledgor's special permission.[1]

§ 58. **The Pledgee's Duty in Regard to the Pledge.**—The pledgee impliedly stipulates that he will take ordinary care of the goods pledged. Since the bailment is beneficial to the pledgee by securing the payment of his debt, and to the pledgor by procuring him credit, it is necessary that he to whom a pledge is bailed shall take ordinary care of it; and he will, consequently, be responsible for ordinary neglect. The obligation of the pledgee to preserve the property is equal to that of the person who has it in his custody on a bailment for hire.[2] He is not, therefore, liable for the loss of the pledge through theft, robbery, fire or causes for which a bailee for hire is not responsible.[3] A creditor, who held a policy of life insurance on his debtor's life, has been held guilty of negligence in not keeping up the payment of the premiums.[4]

But the pledgee's duty is not only to keep the pledge with ordinary care; for in the case of choses in action he is bound to use reasonable diligence to secure their payment when due, and any failure on his part to take steps in the ordinary course of collection, whereby they are rendered valueless, will make him responsible for the loss,[5] unless the contract between the parties ex-

1 Schoul. Bail. 201. See Cockburn, C. J., and Blackburn, J., in Donald *v.* Suckling, L. R. 1 Q. B. 585, 615, 618.

2 Third Nat. Bank *v.* Boyd, 44 Md. 47; 22 Am. Rep. 35; Erie Bank *v.* Smith, 3 Brewst. 9; St. Losky *v.* Davidson, 6 Cal. 643; Girard Fire Ins. Co. *v.* Marr, 46 Pa. St. 504; Petty *v.* Overall, 42 Ala. 145; 94 Am. Dec. 635; Com. Bank of New Orleans *v.* Martin, 1 La. Ann. 344; 45 Am. Dec. 87; Scott *v.* Crews, 2 S. C. 522; Maury *v.* Coyle, 34 Md. 235; Second Nat. Bank *v.* Ocean Nat. Bank, 11 Blatchf. 362; Fleming *v.* Northampton Nat. Bank, 62 How. Pr. 175.

3 Petty *v.* Overall, 42 Ala 145; 94 Am. Dec. 635; Healing *v.* Cattrell, 6 Jur. N. S. 96, note; Fleming *v.* Northampton Bk., 62 How. Pr. 177; Cutting *v.* Marlor, 78 N. Y. 454; Boehm *v.* U. S. 20 Ct. of Cl. 231; Bank *v.* Marshall, 11 Fed. Rep. 19.

4 Soule *v.* Union Bank, 45 Barb. 111.

5 Douglass *v.* Mundine, 57 Tex. 344; Whitin *v.* Paul, 13 R. I. 40; Harper *v.* Second Bank, 12 Lea, 678; Semple, etc. Manfg. Co. *v.* Detwiler, 30 Kas. 386; 2 Pac.

cludes the idea that the pledgee is to do more than receive payment when tendered.[1] Nor is there any duty to collect after the debt is paid,[2] and the pledgee has no right to compromise with the maker of a note and take a less sum than it calls for.[3]

§ 59. **The Pledge an Additional Remedy.**—The pledge affords the pledgee an additional remedy; and does not supersede his right of action for the debt.[4] He may, in such action, attach the pledged property in his hands,[5] and judgment recovered against the pledgor until it is paid, does not require the pledgee to surrender the pledge.[6] If the pledge does not bring

Rep. 511; Wells *v.* Wells, 53 Vt. 1; Wakeman *v.* Gowdy, 10 Bosw. 208; Roberts *v.* Thompson, 14 Ohio St. 1; 82 Am. Dec. 465; May *v.* Sharp, 49 Ala. 140; Noland *v.* Clark, 10 B. Mon. 239; Cardin *v.* Jones, 23 Ga. 175; Reeves *v.* Plough, 41 Ind. 204; Burrows *v.* Bangs, 34 Mich. 304; Goodall *v.* Richardson, 14 N. H. 567; Word *v.* Morgan, 5 Sneed, 79; Jones *v.* Hawkins, 17 Ind. 550; Lambertson *v.* Wisdom, 12 Minn. 232; 90 Am. Dec. 301; Lazier *v.* Nevin, 3 W. Va. 622; Whitten *v.* Wright, 34 Mich. 92; Russell *v.* Hester, 10 Ala. 335; Mullen *v.* Morris, 2 Pa. St. 85; Rice *v.* Benedict, 19 Mich. 132; Barrow *v.* Rhinelander, 3 Johns. Ch. 614; Miller *v.* Gettysburg Bank, 8 Watts, 192; 32 Am. Dec. 449; Hanna *v.* Holton, 78 Pa. St. 334; 21 Am. Rep. 20; Smith *v.* Miller, 43 N. Y. 171; 3 Am. Rep. 690; Wakeman *v.* Gowdy, 10 Bosw. 208; Whitten *v.* Wright, 34 Mich. 92; see Kennedy *v.* Rosier, 71 Ia. 671; 23 N. W. Rep. 226; Westphal *v.* Ludlow, 2 McCrary 505; Marschuetz *v.* Wright, 50 Wis. 175; 6 N. W. Rep. 511. The pledgee of a negotiable security has a right to collect the sum, and sue for it if necessary, in his own name. Jones *v.* Hawkins, 17 Ind. 550; Hilton *v.* Waring, 7 Wis. 492; Nelson *v.* Wellington, 5 Bosw. 178; Bowman *v.* Wood, 15 Mass. 534; Lobdell *v.* Merchants' Bank, 33 Mich. 408; Houser *v.* Houser, 43 Ga. 415; White *v.* Phelps, 14 Minn. 27; 100 Am. Dec. 190. If a note was without consideration between the maker and the pledgor, and was pledged by the latter, the pledgee can only recover on it for the amount of his debt. Fisher *v.* Fisher, 98 Mass. 303; White *v.* Phelps, 14 Minn. 27; 100 Am. Dec. 190; Lobdell *v.* Merchants' Bank, 33 Mich. 408; Houser *v.* Houser, 43 Ga. 415; Mayo *v.* Mayo, 28 Ill. 428; Stoddard *v.* Kimball, 6 Cush. 469; Lawrence *v.* McCalmont, 2 How. 426.

1 Miller *v.* Gettysburg Bank, 8 Watts, 192; 34 Am. Dec. 449.

2 Overlock *v.* Hills, 8 Me. 383.

3 Garlick *v.* James, 12 Johns. 146; 7 Am. Dec. 294; Depuy *v.* Clark, 12 Ind. 427; Union Trust Co. *v.* Rigdon, 93 Ill. 458.

4 Granite Bk. *v.* Richardson, 7 Metc. 407; Story Bail., § 315; Elder *v.* Rouse, 15 Wend. 18; West *v.* Carolina Ins. Co., 31 Ark. 476; Bank of Rutland *v.* Woodruff, 34 Vt. 89; Dugan *v.* Sprague, 2 Ind. 600; Sonoma Valley Bank *v.* Hill, 59 Cal. 107; Jones *v.* Scott, 10 Kan. 33.

5 Buck *v.* Ingersoll, 11 Met. 226; Arendale *v.* Morgan, 5 Sneed, 703; Whitwell *v.* Brigham, 19 Pick. 117; or other property of the pledgor: Taylor *v.* Cheever, 6 Gray, 146.

6 Smith *v.* Strout, 63 Me. 205; Darst *v.* Bates, 95 Ill. 403; Charles *v.* Coker, 2 S. C. 122; Archibald *v.* Argall, 53 Ill. 307; Butterworth *v.* Kennedy, 5 Bosw. 143. Even a promise to do so would generally be unenforceable in that it would lack a consideration. Smith *v.* Strout, *supra.*

enough at sale to pay the debt, the balance is a personal charge against the debtor, and may be recovered as such.[1]

§ 60. **The Right to Redeem.**—The pledgor has a right to redeem, at any time before the pledge has been lawfully disposed of, by sale or otherwise, according to the contract,[2] for even an agreement that the pledge shall be irredeemable, would be void on grounds of public policy, as contrary to equity and good conscience, and as opening the door to oppression and fraud.[3] A reasonable notice of intention to redeem must, however, be given,[4] and a proper tender of the debt.[5] And the pledgee is allowed a reasonable time after the tender before making delivery.[6]

The right to redeem is not lost by the failure to pay the debt at the time stipulated, for this does not pass the title to the pledgee, as we have seen, but simply gives him a right to sell.[7] Nor does the statute of limitations run against the pledge;[8] though if too long a time is allowed to elapse, the court may refuse redemption, the presumption being, in such a case, that the matter has been settled, and the rights of the parties adjusted between themselves.[9]

§ 61. **The Pledgee's Duty to Re-deliver.**—On payment of the debt for which the pledge has been

1 Faulkner *v.* Hill, 104 Mass. 188.

2 Story Bail., § 345; Schoul. Bail., § 224; Bigelow *v.* Young, 30 Ga. 121.

3 Edw. Bail., § 260; Story Bail., § 345; Luckett *v.* Townsend, 3 Tex. 119; 49 Am. Dec. 723.

4 Genet *v.* Howland, 45 Barb. 560; 30 How. Pr. 360.

5 Dunham *v.* Jackson, 6 Wend. 22.

6 Dunham *v.* Jackson, 6 Wend. 22; McAlla *v.* Clark, 55 Ga. 53; Dewart *v.* Masser, 40 Pa. St. 302; Vaughan *v.* Watt, 6 M. & W. 492.

7 Cortelyou *v.* Lansing, 2 Caines. Cas. 200; Railroad Co. *v.* Iron Co., 50 N. H. 57; Walter *v.* Smith, 1 Dowl. & R. 1; 5 B. & Ald. 429.

8 Kemp *v.* Westbrook, 1 Ves. 278; see Reizenstein *v.* Marquardt, 37 N. W. Rep. 506 (Ia.) *ante*, § 29; Whelan *v.* Kinsley, 26 Ohio St. 131.

9 Story Bail., § 346; Schoul. Bail., §§ 224, 225; Waterman *v.* Brown, 31 Pa. St. 161; White Mountain R. R. Co. *v.* Bay State Iron Co., 50 N. H. 37; Whelan *v.* Kinsley, 26 Ohio St. 131; Hancock *v.* Franklin Ins. Co., 114 Mass. 155.

given,[1] or a proper tender,[2] the pledgee is bound to re-deliver the thing pledged, for by such acts the pledgor acquires an immediate and absolute right of property in it;[3] and upon a refusal, the pledgee becomes a wrongdoer, and holds the pledge at his own risk,[4] and it is no excuse that the thing has subsequently been lost without his fault, or become worthless.[5] He must restore the very things received; and cannot offer in their place, articles of a similar kind or value,[6] unless they are things not capable of identification, and which the parties have intended should go into a common stock.[7]

1 Lawrence *v.* Maxwell, 53 N. Y. 19; Mayo *v.* Avery, 18 Cal. 309; Fisher *v.* Brown, 104 Mass. 259; 6 Am. Rep. 235; Merrifield *v.* Baker, 9 Allen, 29; Gibson *v.* Martin, 49 Vt. 474; Houton *v.* Holliday, 2 Murph. 111; 5 Am. Dec. 522; Stearns *v.* Marsh, 4 Denio, 227; 47 Am. Dec. 248; Bryson *v.* Rayner, 25 Md. 424; 90 Am. Dec. 69.

2 McLean *v.* Walker, 10 Johns. 471; Lawrence *v.* Maxwell, 53 N. Y. 19; McCalla, *v.* Clark, 55 Ga. 53; Doak *v.* Bank, 6 Ired. 309; Geron *v.* Geron, 15 Ala. 558; 50 Am. Dec. 143; Potter *v.* Thompson, 10 R. I. 1; Kittera's Es., 17 Pa. St. 416.

3 And of course its increase. Gibson *v.* Martin, 49 Vt 474.

4 Loughbrough *v.* McNevin, 74 Cal. 250; 5 Am. St. Rep. 435; 14 Pac. Rep. 369; 15 Pac. Rep. 773; Cass *v.* Higenbotam, 100 N. Y. 248; 3 N. E. Rep. 189; Oregon &c Trans. Co. *v.* Hilmers, 20 Fed. Rep. 717; Hardy *v.* Jaudon, 1 Robt. 261.

5 Stuart *v.* Bigler, 98 Pa. St. 80.

6 Dykers *v.* Allen, 7 Hill, 497; 42 Am. Dec. 87.

7 Horton *v.* Morgan, 6 Duer, 61; Saltus *v.* Gerpin, 3 Bosw. 257; Hubbell *v.* Drexel, 11 Fed. Rep. 115. In Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720, it is said: "It is, in general, true, that where the pledge is distinctive in its character, and therefore capable of being recognized among other things of like nature, or where a mark is set upon it with a view to its discrimination, the pledgee is bound to re-deliver the identical article pledged, and cannot substitute something of like kind, unless so authorized by the contract. But I think there is a manifest difference, *ex necessitate*, where the thing pledged, from its very nature, is incapable, in itself, of identification, if once mingled with other things of the same kind. In such case, it is the duty of the pledgor to put a mark upon it, by which it may be distinguished; for, as is said in Nourse *v.* Prime, 4 Johns. Ch. 490, 8 Am. Dec. 606, if a person will suffer his property to go into a common mass without making some provision for its identification, he has no right to ask more than that the quantity he put in should always be there and ready for him. By a just fiction of law, that residuum shall be presumed to be the portion he put in. The good sense of these remarks, made in immediate reference to a pledge of shares of bank stock, recommends them to our adoption. They are repeated by Chancellor Kent, in the same case reported in 7 Johns. Ch. 69, and noticed with approbation by Nelson, C. J., in Allen *v.* Dykers, 3 Hill, 593. Speaking of Nourse *v.* Prime, he says: 'As it appeared the defendants always had on hand the requisite quantity of shares, the law will presume the shares so on hand, from time to time, were the shares deposited, because the parties have not reduced the shares to any more certainty.'"

§ 62. **The Pledgee's Right to Sell on Default.** —The nonpayment of the debt, or nonperformance of the engagement which the pledge is given to secure, does not forfeit it, but simply clothes the pledgee with authority to sell the pledge, reimburse himself for his debt, interest and expenses, and hold the residue for the pledgor. In ancient times, the pledgee, unless there was a special agreement to the contrary, was obliged to judicially foreclose the pledge,[1] but this is not now required in all cases, the pledgee being generally permitted, without judicial process, to sell the pledge.[2] But as the law looks to the protection of the pledgor, this right is subject to several conditions which must be strictly performed by the pledgee. These are:

1. The pledgor must be called upon to redeem by paying his debt, in order that he may have an opportunity to prevent a sale if he can.[3] It seems that where the time of payment is fixed by the contract, a demand is not necessary, such a requisite being called for in those cases only where there is no fixed day of payment, or where there has been an indefinite extension of the time,[4] but this distinction has been criticised.[5] The demand is necessary, even though the con-

1 Edw. Bail. § 248.

2 Cole *v.* Daniels 13 Ill. (App.) 23; Robinson *v.* Hurley, 11 Ia. 410; 79 Am. Dec. 497; Odgen *v.* Lathrop, 65 N. Y. 158; Mauge *v.* Heringhi, 26 Cal. 577; Lewis *v.* Mott, 36 N. Y. 395; Hancock *v.* Franklin Ins. Co., 114 Mass. 156; Richards *v.* Davis, 5 Pa. L. J. 471; Merchants' Bank *v.* Thompson, 133 Mass. 482; Water Power Co. *v.* Brown, 22 Kan. 676; McDowell *v.* Chicago Steel Works, 124 Ill. 491; 7 Am. St. Rep. 381; 16 N. E. Rep. 854; Canfield *v.* Minn. etc. Assn., 14 Fed. Rep. 801; 15 *Id.* 260; Pigot *v.* Cubley, 15 Com. B., N. S., 701; 10 Jur., N. S., 318.

3 Wilson *v.* Little, 2 N. Y. 443; 51 Am. Dec. 307; Stokes *v.* Frazier, 72 Ill. 428; Gay *v.* Moss, 34 Cal. 125; Robertson *v.* Lippincott, 1 Phila. 308; Sitgreaves *v.* Farmers' Bank, 49. Pa. St. 359; Bryan *v.* Baldwin, 52 N. Y. 233; McDowell *v.* Chicago Steel Works, 124 Ill. 491; 7 Am. St. Rep. 381; 16 N. E. Rep. 854.

4 Chouteau *v.* Allen, 70 Mo. 290; Martin *v.* Reed, 11 Com. B., N. S., 730; Wilson *v.* Little, 2 N. Y. 443; 51 Am. Dec. 307 Stokes *v.* Frazier, 72 Ill. 428; Wadsworth *v.* Thompson, 8 Ill. 423.

5 See Stearns *v.* Marsh, 4 Denio. 227; 47 Am. Dec 248.

tract stipulates that the pledgee may sell without notice.[1]

2. The pledgor must be personally notified of the time and place of the sale, in order that he may have an opportunity to prevent the sacrifice of his property,[2] and this, whether the debt is payable on a fixed day or not,[3] or whether the pledge was made before or after the debt had matured;[4] unless the contract gives a right to sell without notice.[5]

1 Wilson *v.* Little, 2 N. Y. 443; 51 Am. Dec. 307.

2 Davis *v.* Funk, 39 Pa. St. 243; 80 Am. Dec. 519; Milliken *v.* Dehon, 10 Bosw. 325; Stevens *v.* Hurlburt Bank, 31 Conn. 146; Nelson *v.* Edwards, 40 Barb. 279; Brass *v.* Worth, 40 Barb. 648; Cushman *v.* Hayes, 46 Ill. 145; Conyngham's Appeal, 57 Pa. St. 474; Bryan *v.* Baldwin, 52 N. Y. 233; Washburn *v.* Pond, 2 Allen, 474; Wheeler *v.* Newbould, 16 N. Y. 392; Mauge *v.* Heringhi, 26 Cal. 577; Markham *v.* Jaudon, 41 N. Y. 235; Lucketts *v.* Townsend, 3 Tex. 119; 49 Am. Dec. 723; Maryland etc. Ins. Co. *v.* Dalrymple, 25 Md. 242; 89 Am. Dec. 779; Ogden *v.* Lathrop, 65 N. Y, 162; Lewis *v.* Graham, 4 Abb. Pr. 110; Lewis *v.* Varnum, 12 Abb. 308; Wilson *v.* Little, 2 N. Y. 448; 51 Am. Dec. 307; Stearns *v.* Marsh, 4 Denio, 227; 47 Am. Dec. 248; De Lisle *v.* Priestman, 1 Browne (Pa.) 176; Diller *v.* Brubaker, 52 Pa. St. 498; 91 Am. Dec. 177; Strong *v.* Nat. Bank, 45 N. Y. 718; Jeanes' Appeal, 116 Pa. St. 573; 2 Am. St. Rep. 573; 11 Atl. Rep. 862.

3 "It is said that the law makes a distinction between the case of a pledge for a debt payable immediately, and one where the debt does not become payable until a future day; and that in the latter case the creditor is not bound to call for a redemption or to give notice of sale though in the former it is conceded that there must be such demand and that notice must be given. Non-payment of the debt at the stipulated time did not work a forfeiture of the pledge, either by the civil or at the common law. It simply clothed the pledgee with authority to sell the pledge and reimburse himself for his debt, interest, and expenses; and the residue of the proceeds of the sale then belonged to the pledgor. I find no authority countenancing the distinction contended for; but on the contrary, I understand the doctrine to be well settled, that whether the debt be due presently or upon time, the rights of the parties to the pledge are such as have been stated: Cortelyou *v.* Lansing, 2 Caines Cas. 204; 2 Kent's Com., 5th ed., §§ 581, 582; 4 Kent's Com., 5th ed., §§ 138, 139; Tucker *v.* Wilson, 1 P. Wms. 261; Lockwood *v.* Ewer, 2 Atk. 303; Johnson *v.* Vernon, 1 Bail. 527; Perry *v.* Craig, 3 Mo. 516; Parker *v.* Brancker, 22 Pick. 40; De Lisle *v.* Priestman, 1 Browne (Pa.) 176; Story's Eq § 1008; Story Bail. §§ 309, 310, 346; Hart *v.* Ten Eyck, 2 Johns. Ch. 100; Patchin *v.* Pierce, 12 Wend. 61; Garlick *v.* James, 12 Johns. 146; 7 Am. Dec. 294. Nor do I see any reason for such a distinction. In either case the right to redeem equally exists until a sale; the pledgor is equally interested, to see to it that the pledge is sold for a fair price. The time when the sale may take place is as uncertain in the one case as in the other; both depend upon the will of the pledgee, after the lapse of the term of credit in the one case, and after a reasonable time in the other, unless, indeed, the pledgor resorts to a court of equity to quicken a sale." Stearns *v.* Marsh, 4 Denio, 227; 47 Am. Dec. 248.

4 Edw. Bail. § 249.

5 Taft *v.* Church, 39 N. E. Rep. 283 (Mass).

Where personal notice cannot be given—it being borne in mind that formal notice is unnecessary if the pledgor have actual knowledge in any other way[1]—a judicial sale by a bill in equity must be resorted to,[2] and a judicial sale is said to be the most advisable in all cases where the pledges are of large value, on the ground that courts watch any other sale with uncommon jealousy and vigilance; and any irregularity may bring its validity into question.[3] The power to sell even where express and a right to a judicial foreclosure are cumulative; the pledgee may pursue either remedy.[4]

3. The sale must be public and not private,[5] in order that more bidders being thereby necessarily attracted, a better price will be likely to be realized,[6] though, by agreement, the sale may be private.[7]

If the pledgee sell without the foregoing requisites to a valid sale, the pledgor may recover the value of it from him, without tendering the debt; because by the wrongful sale, the pledgee incapacitates himself to perform his part of the contract, that is to return the

1 Alexandria R. Co. *v.* Burke, 22 Gratt. 254; or notice be given to his agent; Potter *v.* Thompson, 10 R. I. 1. A newspaper notice would be ineffectual unless it were shown to have been brought home to the pledgor. Schoul. Bail., § 208; see Stokes *v.* Frazier, 72 Ill. 428; City Bank of Racine *v.* Babcock, 1 Holmes, 180.

2 Schoul. Bail. § 208; Garlick *v.* James, 12 Johns. 147; 7 Am. Dec. 294; Coffin *v.* Chicago Co., 67 Barb. 339; Robinson *v.* Hurley, 11 Iowa, 410; 79 Am. Dec. 497; Smith *v.* Coale, 34 Leg. Int. 58; 12 Phila. 177.

3 Story Bail. § 310; Boynton *v.* Payrow, 67 Me. 557; Duncomb *v.* R. Co. 84 N. Y. 190.

4 Coffin *v.* Chicago etc. Const Co., 67 Barb. 337; 4 Hun. 625; Donohoe *v.* Gamble, 38 Cal. 341; 99 Am. Dec. 399.

5 Washburn *v.* Pond, 2 Allen, 474; Wheeler *v.* Newbould, 16 N. Y. 392; Strong *v.* National Merchants' Bank, 45 N. Y. 718; Willoughby *v.* Comstock, 3 Hill, 389; Bryson *v.* Rayner, 25 Md. 424; 90 Am. Dec. 69; Diller *v.* Brubaker, 52 Pa. St. 498; 91 Am. Dec. 177; Jeanes' Appeal, 116 Pa. St. 573; 2 Am. St. Rep. 624; 11 Atl. Rep. 862. A sale on a brokers' board has been held a private sale: Markham *v.* Jaudon, 41 N. Y. 235; Dykers *v.* Allen, 7 Hill, 497; 42 Am. Dec. 89; Brass *v.* Worth, 40 Barb. 648; Wheeler *v.* Newbould, 16 N. Y. 392; raised but not decided in Child *v.* Hugg, 41 Cal. 519. But see Bryson *v.* Rayner, 25 Md. 424; 90 Am. Dec. 69; Maryland etc. Ins. Co. *v.* Dalrymple, 25 Md. 242; 89 Am. Dec. 779; Schepeler *v.* Eisner, 3 Daly, 11.

6 When therefore a higher price is obtainable at a private sale it will be permitted to stand. *Ex parte* Fisher, 20 S. C. 129.

7 Bryson *v.* Rayner, 25 Md. 424; 90 Am. Dec. 69; Milliken *v.* Dehon, 27 N. Y. 368.

pledge, and the law does not demand a tender that would be nugatory.[1]

§ 63. **Pledgee Cannot Purchase.** — The pledgee stands in a fiduciary relation to the pledgor, and can, therefore, not become a purchaser, so as to acquire any personal advantage from his position to the prejudice of the interests of his principal or *cestui que trust*, the pledgor;[2] and a purchaser from him, with knowledge of the facts, stands in no better position than he does.[3] The purchase by the pledgee is not void, but simply voidable, and may be ratified by the pledgor,[4] and the assent of the pledgor of chattels to their purchase by the pledgee will be presumed, where the facts are notorious and no dissent is shown.[5]

§ 64. **Irregular Sale May be Ratified.**—And the pledgor may ratify a sale irregular or illegal,[6] either expressly or by his laches.[7] The right to a notice of sale may be waived in the contract,[8] in which case there is left upon the pledgee simply the obligation to sell publicly and fairly for the best price.[9] But where a

[1] Edw. Bail., § 249; McLean *v.* Walker, 10 Johns. 472; Cortelyou *v.* Lansing, 2 Caines Cas. 200; Dykers *v.* Allen, 7 Hill, 497; 42 Am. Dec. 87; Wilson *v.* Little, 2 N. Y. 443; 51 Am. Dec. 307; Lewis *v.* Graham, 4 Abb. Pr. 106.

[2] Bryan *v.* Baldwin, 52 N. Y. 233; Pigot *v.* Cubley, 15 Com. B., N. S., 702; Middlesex Bank *v.* Minot, 4 Met. 25; Hestonville R. R. Co. *v.* Shields, 2 Brewst. 257; Bank *v.* R. R. Co., 8 Iowa, 277; 74 Am. Dec. 302; Hope *v.* Lawrence, 1 Hun. 317; Chicago Artesian Well Co. *v.* Corey, 60 Ill. 73; Stokes *v.* Frazier, 72 Ill. 428; Baltimore Ins. Co. *v.* Dalrymple, 25 Md. 269; Bryson *v.* Rayner, 25 Md. 424; 90 Am. Dec. 69; Star Fire Ins. Co. *v.* Palmer, 9 Jones & S. 267.

[3] Canfield *v.* Minneapolis Agricultural etc. Assn., 14 Fed. Rep. 801.

[4] Hill *v.* Finigan, 62 Cal. 426; Killian *v.* Hoffman, 6 Ill. (App.) 200.

[5] Carroll *v.* Mullanphy Sav. Bk., 8 Mo. (App.) 249; Lacombe *v.* Forstall, 123 U. S. 562; 8 S. C. Rep. 247.

[6] Child *v.* Hugg, 41 Cal. 519; Hamilton *v.* State Bank, 22 Iowa 306; Clark *v.* Bouvain, 20 La. Ann. 70; Bryan *v.* Baldwin, 52 N. Y. 233; Earle *v.* Grant, 14 R. I. 228.

[7] McDowell *v.* Chicago Steel Works, 124 Ill. 491; 7 Am. St. Rep. 381; 16 N. E. Rep. 854; 22 Ill. App. 405; Martin *v.* Somerville Co., 27 How. Pr. 400.

[8] Haskins *v.* Patterson, 1 Edm. 120; Jeanes' Appeal, 116 Pa. St. 573; 2 Am. St. Rep. 624; 11 Atl. Rep. 862; McDowell *v.* Chicago Steel Works, 124 Ill. 491; 7 Am. St. Rep. 381; 16 N. E. Rep. 854.

[9] Maryland etc. Ins. Co. *v.* Dalrymple, 25 Md. 242; 89 Am. Dec. 779; Baltimore etc. Ins. Co. *v.* Dalrymple, 25 Md. 269.

pledge of promissory notes contains an agreement between pledgor and pledgee that if the debt for which the notes are pledged is not paid at maturity, the latter can make the money out of them in the best way he can, and that he may sell the notes for that purpose, it is held that the pledgee cannot sell the notes without notice to the debtor to redeem, and of the time and place of sale, and that a notice after the debt matures, that if it is not paid within a specified time, the pledgee will make the best disposition he can of the notes, to raise the money, either by public or private sale, is not sufficient.[1] And where one entitled to insist upon notice so acts as to put it out of the power of the other party to give him notice, he loses the right to claim it.[2]

§ 65. **Power to Sell not Mandatary.**—The power to sell the pledge is not considered as a trust reposed in the pledgee, but rather as an incident to the contract of pledge, and a part of the security.[3] Hence, the pledgee is not bound to sell, and cannot be held liable for the depreciation of the value of the chattel between the time when the power might have been exercised and when the sale was actually made.[4] As the pledgor

[1] Goldsmidt *v.* Worthington etc. Trustees, 25 Minn. 202.

[2] City Bank of Racine *v.* Babcock, 1 Holmes, 181. In this case bonds were pledged by a bank as security for the performance of an agreement between the bank and the pledgee, and the pledgee was empowered to sell the bonds, in case of breach of the agreement by the bank, on thirty days' notice to it of the intended sale, and credit the proceeds on a debt due from the bank. The bank afterwards failed, closed its place of business, and thereafter transacted no business, and had no office, nor acting officers, and did not perform the agreement. About three years afterwards, the pledgee sold the bonds, in good faith, at their market value, without notice to the bank. It was held that as the giving of the notice had been rendered impossible by the act of the bank, neither the pledgee nor its agent in the sale was liable for a conversion of the bonds.

[3] Alexandria etc. R. Co. *v.* Burke, 22 Gratt. 254.

[4] Granite Bk. *v.* Richardson, 7 Metc. 47; Colquitt *v.* Stultz, 65 Ga. 305; Napier *v.* Central Bk., 68 Ga. 637; Cumnock *v.* Sav. Inst. 142 Mass. 342; 56 Am. Rep. 679; 7 N. E. Rep. 867; Robinson *v.* Hurley, 11 Iowa 410; 79 Am. Dec. 497; Richardson *v.* Ins. Co., 27 Gratt. 749; Badlam *v.* Tucker, 1 Pick. 389; 11 Am. Dec. 202; Smith *v.* Strout, 63 Me. 205; Richards *v.* Davis, 5 Pa. L. J. 471; Wood *v.* Morgan, 5 Sneed, 79; Bank of Rutland *v.* Woodruff, 34 Vt. 89; O'Neil *v.* Wigham, 87 Pa. St. 394; Rozet *v.* McClellan, 48 Ill. 345; 95 Am. Dec. 551; Wilson *v.* Culver, 33 Fed. Rep. 708; see Nourse *v.* Prime, 4 Johns. Ch. 490; 8 Am. Dec. 607.

has always open to him to pay the debt and re-possess the pledge,[1] he ought not to be permitted to complain that the pledge is retained for the exact purpose for which it was made. On the other hand, a different rule would apply where, by the contract, the pledgee has taken upon himself the duties of an agent or factor to sell the goods and account for the proceeds. Here his duty is to sell so as to protect the rights of all the parties in interest, and he is not allowed to make an unreasonable delay in the execution of his trust.[2]

§ 66. **Pledgee not Liable for Consequences of Sale, When.**—He is not liable, if he sell honestly and fairly, and after the proper notice, for a loss which may ensue to the owner from the property realizing less than its estimated value.[3] And the pledgee is not bound to defer selling until the market is better.[4]

The pledgee has no right to sell before default,[5] or after a wrongful demand by him, or a tender of what is due by the pledgor.[6] If he sell more of the property than is enough to pay the debt secured, he is liable in damages to the pledgor, whose acceptance of the surplus will not defeat his right to recover such damages.[7] He may sell negotiable paper not yet due, only where it has a long time to run;[8] in other cases,

1 Granite Bank *v.* Richardson, *supra.*

2 See Granite Bk. *v.* Richardson, 7 Metc. 407; Norton *v.* Squire, 16 Johns. 225; Franklin Sav. Inst. *v.* Preetorius, 6 Mo. (App.) 470.

3 Ainsworth *v.* Bowen, 9 Wis. 348; White *v.* Rahway, 16 Fed. Rep. 833; Jeanes' Appeal, 116 Pa. St. 573; 2 Am. St. Rep. 624; 11 Atl. Rep. 862.

4 King *v.* Texas Banking Co., 58 Tex. 669.

5 Johnson *v.* Stear, 15 Com. B., N. S., 730; Ogden *v.* Lathrop, 1 Sweeny, 643.

6 Pigot *v.* Cubley, 15 Com. B., N. S., 702; Hope *v.* Lawrence, 1 Hun, 317; Blood *v.* Erie Sav. Co., 30 Atl. Rep. 362 (Pa.).

7 Lewis *v.* Graham, 4 Abb. Pr. 110; Fitzgerald *v.* Blocher, 32 Ark. 742; 29 Am. Rep. 3.

8 Richards *v.* Davis, 5 Pa. L. J. 471.

it is his duty to wait and collect it;[1] though a court, under special circumstances, may order a sale.[2]

The pledgee, on the sale, does not warrant the title;

[1] Whittaker *v.* Charleston Gas Co., 16 W. Va. 717; Wheeler *v.* Newbould, 16 N. Y. 392; Fraker *v.* Reeve, 36 Wis. 85. In Joliet Iron Co. *v.* Scioto Fire Brick Co., 82 Ill. 548, 25 Am. Rep. 341, the Court say: "The pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged, upon default of payment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. A person holding property or securities in pledge occupies the relation of trustee for the owner, and as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would with his own. From the very nature of the case, property can only be applied as security through the process of sale. Not so with bonds, mortgages, or promissory notes: Wheeler *v.* Newbould, 16 N. Y. 392. It is insisted, however, that the bonds mentioned in the plea are not shown to have been commercial paper. It is not perceived that this could in any way alter the case. All the reasoning in support of the doctrine laid down as to commercial paper applies with the same, if not with more, force to bonds payable upon condition. Put up to sale, no bidder can by mere inspection of the paper form any just judgment as to the value of such paper."

[2] Cleghorn *v.* Minnesota Trust Co., 59 N. W. Rep. 320, the Court saying: "The rule of law undoubtedly is that, without express agreement to the contrary, commercial paper pledged as collateral cannot be sold by the pledgee at either public or private sale. The reason for this is that such paper has no market value, and consequently, if exposed for sale, would be liable to be sacrificed. But the question of the right of a pledgee to come into court, and have a decree for a judicial sale of the pledge, is an entirely different question. This was always a well-recognized head of equitable jurisdiction, even where the pledgee or mortgagee had a right to sell the property. The sale being under the direction and control of the court, it has the power, as it is its duty, to see to it that the property shall not be sacrificed; and hence such a sale is not liable to the evils or abuses to which a sale by a party himself is subject. Just when and under what circumstances a court would or should order a sale of commercial paper or other collateral of similar character it is not necessary to consider. The right to do so, at least under special circumstances, is undoubted. Pom. Eq. §§ 164, 1231; Daniels, Neg. Inst. § 833; Jones, Pledges, § 655; Donohoe *v.* Gamble, 38 Cal. 340. In the present case the collateral note had some four years to run before it matured. The pledgor had become insolvent, and had made a general assignment for the benefit of all his creditors. The plaintiff had proved his claim in the insolvency proceedings, and had claimed, as he might, the right to participate in the benefits of the assignment in case the pledged property proved insufficient to satisfy his claim in full. Hence, unless the collateral should be sold, the final settlement of the estate of the insolvent would be postponed for several years. These facts made a proper case, even under the strictest rule, for a judicial sale of the collateral note. Counsel for defendant argues that the pledge was made under a contract, implied by law, that the paper should not be sold, but that the plaintiff should wait until its maturity, and then collect it in the ordinary way, and that a court has no power to change the contract of the parties. There is nothing in this point. The question is one of remedy, rather than of contract right; and if the law as to the manner of realizing on the collateral is to be deemed to have entered into, and become a part of, the contract, this would be as applicable to the rule which authorizes a judicial sale as it is to the rule which forbids the pledgee himself to sell."

he sells simply what interest he may have in the chattel;[1] so, also, where he pledges his interest.[2]

§ 67. **The Pledgor's Right to the Surplus.**—If the pledgee realizes upon the security deposited with him, after his debt becomes due, by proceeding to sell on notice, or collecting where a chose in action is pledged, the fund which comes into his hands must, after the payment of his debt, be held in trust for the pledgor, and must be paid over to him.[3] A pledgee who, in replevin for the pledge, recovers judgment for its value in money, which realizes him more than the amount of his demand, holds the balance in trust for the pledgor.[4]

§ 68. **The Pledgee's Right of Action.**—Like other bailees, the pledgee's special property gives him a right to sue, either for the restitution of the thing,[5] or for damages, as he elects, the owner,[6] or a stranger[7] who may take it from his possession. Against the owner he is entitled to recover only his special interest in the chattel, but against a stranger he is entitled to the full value of the pledge.[8] The pledgee may recover on an obligation of a third party pledged to him by his debtor, to its full amount, and if such amount be greater than that due from the pledgor, he recovers the excess for the use of the latter. Where, however, the maker of the instrument has a good defense against

1 Morley *v.* Attenborough, 3 Ex. 500; Baker *v.* Arnot, 2 Hun. 682; 67 N. Y. 448.

2 Northampton Bk. *v.* Mass. Co., 123 Mass. 330.

3 Hunt *v.* Nevers, 15 Pick. 500; 26 Am. Dec. 616; Nottebohm *v.* Maas, 3 Robt. 249.

4 Miles *v.* Walther, 3 Mo. (App.) 96.

5 Coleman *v.* Shelton, 2 McCord Ch. 126; 16 Am. Dec. 639; Noles *v.* Marable, 50 Ala. 366.

6 Treadwell *v.* Davis, 34 Cal. 601; 94 Am. Dec. 770; Lyle *v.* Barker, 5 Binn. 457; Ayre *v.* South Australian Banking Co., L. R. 3 P. C. 548; Way *v.* Davidson, 12 Gray, 465; 74 Am. Dec. 604; Hendrix *v.* Harman, 19 S. C. 483.

7 Woodruff *v.* Halsey, 8 Pick. 333; 19 Am. Dec. 329; Brownell *v.* Hawkins, 4 Barb. 491; Noles *v.* Marable, 50 Ala. 366; Lyle *v.* Barker, 5 Binn. 457.

8 Treadwell *v.* Davis, 34 Cal. 601; 94 Am. Dec. 770; Adams *v.* O'Connor, 100 Mass. 515; 1 Am. Rep. 137; Benjamin *v.* Stremple, 13 Ill. 466; Harker *v.* Dement, 9 Gill, 7; 62 Am. Dec. 670; Lyle *v.* Barker, 5 Binn 457; Swire *v.* Leach, 18 Com. B , N. S., 479; Pomeroy *v.* Smith, 17 Pick. 85; Brownell *v.* Hawkins, 4 Barb. 491.

the pledgor, the better rule appears to be that even a *bona fide* holder without notice can recover the amount of his principal debt only.[1]

§ 69. **The Pledgor's Right of Action.** — The pledgor has no occasion, as a general rule, to come into a court of equity for the redemption of goods deposited in pledge. On the payment of his debt, he has a legal remedy for the recovery of the pledge.[2] The remedy is sometimes in the nature of trover for a refusal to redeliver on demand; sometimes in the nature of replevin for detaining the goods; depending in each case upon the circumstances attending the transaction. Where, however, there are accounts to be settled, or discovery is desired, he may properly file a bill in equity for redemption.[3] If the goods pledged have been wrongfully sold by the pledgee, a recovery may be had against him in a suit in the nature of an action on the case; or in assumpsit to recover the value of the property.[4] But though a conversion of the pledge, by the pledgee, renders him liable for its value, it does not discharge the original debt. If the debt for which the pledge is deposited has not been paid, and an action is brought for the appropriation or conversion of the pledge, the pledgee may recoup the amount of his debt.[5] So the debtor, when sued for the debt, may set off the value of the property converted.[6] But it seems that in the case of a perishable article, or where it

1 Union Bk. *v.* Roberts, 45 Wis. 393; First Nat. Bk. *v.* Mann, 12 S. W. Rep. 1015; see Steere *v.* Benson, 2 Ill. (App.) 560.

2 Edw. Bail. § 250.

3 Bartlett *v.* Johnson, 9 Allen 530; Conyngham's Appeal, 57 Pa. St. 474; Hasbrouck *v.* Vandervoort, 4 Sand. 74; Merrill *v.* Houghton, 51 N. H. 61; White Mountain R. R. Co. *v.* Bay State Iron Co., 60 N. H. 57; Chapman *v.* Turner, 1 Call, 280; 1 Am. Dec. 514; Brown *v.* Runals, 14 Wis. 693; Flowers *v.* Sproule, 2 A. K. Marsh. 54.

4 Stearns *v.* Marsh, 4 Denio, 227; 47 Am. Dec 248.

5 Edw. Bail. § 213; Wilson *v.* Little, 2 N. Y. 443; 51 Am. Dec. 307. See Story Bail. § 308, note; Lewis *v.* Mott, 36 N. Y. 395; Bulkeley *v.* Welch, 31 Conn. 339; Donald *v.* Suckling, L. R. 1 Q. B. 585; Johnson *v.* Stear, 15 Com. B., N. S., 730.

6 Stearns *v.* Marsh, *supra*; Levy *v.* Loeb, 47 N. Y. (S. C.) 61; 75 N. Y. 609.

would be greatly to the benefit of the pledgor to have a sale at once, a court of equity would order it at the instance of the pledgor. [1]

§ 70. **The Pledge, How Extinguished.** — The pledge becomes extinguished, and the bailment contract at an end, in the following modes, viz., by 1. Payment; 2. Release or waiver; 3. Loss or destruction; 4. Surrender; 5. Limitation; 6. Merger.

1. By payment of the debt or discharge of the engagement, the contract is ended.[2] If the principal obligation be conditional, that of the pledge is confirmed or extinguished with it. If the obligation be null, so also is the pledge; for the pledge is a security collateral to the original undertaking; so that a discharge of the latter is a redemption of the pledge, by which the absolute property therein vests in the pledgor. Whatever, in short, satisfies or renders invalid the original debt, will equally discharge such a collateral undertaking as a pledge given for its payment. But it seems that a court will not aid the pledgor to recover back a security which he has voluntarily parted with for value received, though the transaction may not have been a legal one, or for a legal object.[3]

2. The release of the security by the pledgee will, of course, extinguish it,[4] and so, where he waives the security, as for example, where he attaches the pledge as the pledgor's property, he abandons the lien of his pledge.[5] But a waiver of a part of the security is not a waiver of all.[6]

1 Story Bail. § 320; Story's Eq. §§ 1031-1033; Kemp *v.* Westbrook, 1 Ves. Sr. 278.

2 Story Bail., § 359; Mitchell *v.* Roberts, 17 Fed. Rep. 776; Loughbrough *v.* McNevin, 74 Cal. 250; 5 Am. St. Rep. 435; 14 Pac. Rep. 69; 15 Pac. Rep. 773; Merrifield *v.* Baker, 9 Allen, 29; Ward *v.* Ward, 37 Mich. 253.

3 Edw. Bail. § 247; King *v.* Green, 6 Allen, 139.

4 Homes *v.* Crane, 2 Pick. 607.

5 Citizens Bank *v.* Dows, 68 Ia. 460; 27 N. W. Rep. 459.

6 Macomber *v.* Parker, 14 Pick. 507.

3. Where the pledge is lost, or destroyed,[1] it is, of course, at an end, like any other bailment; if the loss is not the bailee's fault, the debt is not affected; but the pledgee cannot recover the debt for which it was security, without showing that the loss was not attributable to his fault.[2] While the pledgee has no right to use the pledge except with the express or implied assent of the pledgor,[3] or where its use is beneficial, or necessary to the preservation of the thing pledged, or its keeping is an expense to the pledgee;[4] yet it seems that by using the pledge to its damage the pledgee, though liable for the loss, does not forfeit the security, or become liable as for a conversion of it.[5]

4. If the pledgee voluntarily surrender the possession of the pledge by delivering it back to the pledgor, his lien will be thereby terminated.[6] This will not be the effect, however, where it is delivered back to the owner for a temporary purpose only, on an agreement that it shall be restored; for in this case, the pledgee may recover it against the owner, if he refuse to restore it after the temporary purpose is fulfilled.[7] So, if it be delivered back to the owner in a new character, as for example, as a special bailee or agent, the pledgee will be still entitled to the pledge, not only as against

1 Story Bail., § 362.

2 Crocker *v.* Monrose, 18 La. 553; 36 Am. Dec. 660.

3 Lawrence *v.* Maxwell, 53 N. Y. 22; Thompson *v.* Patrick, 4 Watts, 414.

4 Laws. Rights, Rem. & Pr., § 1761.

5 Thompson *v.* Patrick, 4 Watts, 414; Heath *v.* Silverthorn Co., 39 Wis. 147.

6 Kimball *v.* Hildreth, 8 Allen, 167; Beeman *v.* Lawton, 37 Me. 543; Russell *v.* Fillmore, 15 Vt. 135; Eastman *v.* Avery, 23 Me. 248; Bonsey *v.* Amee, 8 Pick. 236; Homes *v.* Crane, 2 Pick. 607; Look *v.* Comstock, 15 Wend. 244; Day *v.* Swift, 48 Me. 368; Shaw *v.* Wilshire, 65 Me. 485; Mills *v.* Stewart, 5 Humph. 308; Thompson *v.* Dolliver, 132 Mass. 103; Babcock *v.* Lawson, L. R. 5 Q. B. D. 284; 4 *Id.* 394; Walker *v.* Staples, 5 Allen, 34; Collins *v.* Buck, 63 Me. 459; Fletcher *v.* Howard, 2 Aik. 115; 16 Am. Dec. 686; Treadwell *v.* Davis, 34 Cal. 601; 94 Am. Dec. 770; Black *v.* Bogert, 65 N. Y. 601; Barrett *v.* Cole, 4 Jones, 40; Citizens' Nat. Bank *v.* Hooper, 47 Md. 88; Whitaker *v.* Sumner, 20 Pick. 399.

7 Macomber *v.* Parker, 14 Pick. 509; Reeves *v.* Capper, 5 Bing. N. C. 136; Ingalls *v.* Van Bokkelen, 7 Cow. 670; Jones *v.* Baldwin, 12 Pick. 316; Hays *v.* Riddle, 1 Sand. 248; Way *v.* Davidson, 12 Gray, 465; 74 Am. Dec. 604; Wolcott *v.* Keith, 7 Fost. 196; Citizens' Nat. Bk. *v.* Hooper, 47 Md. 88; Cooper *v.* Ray, 47 Ill. 53.

the owner, but also as against third persons.[1] In an early case, a master of a ship pledged his chronometer to the owners; they permitted him to keep it on the ship and use it for the purpose of navigation. It was held that they had not parted with the possession.[2] But a bona fide purchaser of pledged property, redelivered by the pledgee to the pledgor for temporary use, will be protected against the claims of the pledgee on the property.[3] Of course, it will not be affected by the pledgee's losing possession of it, either by force or fraud.[4]

5. A simple contract debt is not excepted from the statute of limitations because accompanied by a pledge as collateral security. If, therefore, the debt be barred by the statute, it seems the pledgor may recover the pledge; unless, indeed, it should be held that the pledgee acquires, with the special property transferred to him, a power coupled with an interest to sell the pledge and apply the proceeds to the payment of the debt, for such an authority cannot be revoked at the pleasure of the person granting it.[5]

6. It has been said that the pledge will be extinguished by the taking by the creditor of a higher security for the same debt;[6] and such is the rule as to contracts generally, *i*, *e*., that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition is extinguished or swallowed up in the higher security.[7] But Mr. Edwards says:[8] "It has

1 Clark *v*. Iselin, 21 Wall. 300; Hutton *v*. Arnett, 51 Ill. 198; Cooper *v*. Ray, 47 Ill. 53; White *v*. Platt, 5 Denio, 269; *In re* Rawson, 2 Low. 519; Thayer *v*. Dwight, 104 Mass. 257.

2 Reeves *v*. Capper, 5 Bing. N. C. 136.

3 Britton *v*. Harvey, 16 South. Rep. 747 (La.)

4 Eaton *v*. Hodges, 18 Fed. Rep. 677; Roberts *v*. Wyatt, 2 Taunt. 268; Way *v*. Davidson, 12 Gray, 465; 74 Am. Dec. 604; Soule *v*. White, 14 Me. 436; Wolcott *v*. Keith, 2 Fost. 196; Bruley *v*. Rose, 57 Iowa, 651.

5 Edw. Bail. § 269; Story Bail. § 362.

6 Story Bail. § 360.

7 Laws. Contr. § 428.

8 Bail. § 272.

never been applied to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt, or voluntary surrender alone. A pledge being a security of this nature, is not affected by the recovery of a judgment,[1] or the taking of a bond, or other security for the original debt;[2] it is given to secure the payment of the demand, and the law will hold it to the accomplishment of that purpose."

§ 71. **Effect of Death of Either Party.** — The right of redemption descends to the personal representatives of the pledgor; if the pledgee sell the pledge without notice, before application to redeem, he is answerable for the value of the pledge at the time of the application. There is no reason why the death of either party to the contract should affect the right of redemption, or prevent it from descending entire and unimpaired to the representatives of the pledgor.[3]

And the pledgor may redeem against the representatives of the pledgee.[4] A pledgee is not obliged to present his claim to the administrator of the pledgor, unless he seeks recourse against other property of the estate than that pledged.[5]

1 *Ante* § 59.

2 See Collins *v.* Dawley, 4 Cal. 138; 34 Am. Rep. 72; Bank of America *v.* McNeil, 10 Bush, 54.

3 Cortelyou *v.* Lansing, 2 Caines Cas. 200; Story Bail. § 348.

4 Story Bail. § 348. See Hunt *v.* Nevers, 15 Pick. 500; 26 Am. Dec. 616.

5 Kibbe's Estate, 57 Cal. 407.

DIVISION II.

THE EXCEPTIONAL BAILMENT.

PART I.

THE INNKEEPER.

CHAPTER VIII.

INNKEEPERS.

SECTION 72. Who are Innkeepers.
73. Duty to Receive the Public.
74. Duty only Toward Guests.
75. Duty as to Guest's Person.
76. An Insurer of Guest's Property.
77. At what Time Liability Begins.
78. At what Time Liability Ends.
79. For what Property Responsible.
80. Contributory Negligence of Guest.
81. Limitation of Innkeeper's Liability.
82. The Innkeeper's Lien.

§ 72. **Who are Innkeepers.**—An innkeeper is the keeper of an inn, tavern, hotel or other public place for the entertainment of strangers or visitors.[1] Though formerly[2] an inn was defined to be "a house where a traveler is furnished with everything which he has occasion for while on his way;" yet in modern times the requirements of the public, the modes of traveling, and the necessities of individuals have changed somewhat, and the methods of keeping houses of entertainment have changed with them. One is, therefore, none the less an innkeeper because he does not provide wine, spirits, or malt liquors for his guests;[3] or does not provide accommodation for his beast as well as for the man;[4] or that he provides lodging only, and not meals;[5]

1 Taylor *v.* Monnot, 4 Duer, 116; Howth *v.* Franklin, 20 Tex. 798; 73 Am. Dec. 218; *re* Jones, 3 Ch. Div. 457; Smith *v.* Scott, 2 Moore & S. 35; Bonner *v.* Welborn, 7 Ga. 296; Com. *v.* Weatherbee, 101 Mass. 214; State *v.* Chamblyss, Cheves, 222; 34 Am. Dec. 593; Rafferty *v.* New Brunswick Fire Insurance Co., 18 N. J. L. 480; 38 Am. Dec. 525; Gray *v.* Com. 9 Dana 308; 35 Am. Dec. 137; Overseers *v.* Warner, 3 Hill, 150.

2 Thompson *v.* Lacy, 3 B. & Ald. 266.

3 Pinkerton *v.* Woodward, 33 Cal. 596; 91 Am. Dec. 657.

4 *Id.*

5 *Id.*; Krohn *v.* Sweeney, 2 Daly, 200; Bernstein *v.* Sweeny, 33 N. Y. Sup. Ct. 271; Taylor *v.* Monnot, 4 Duer, 16.

or that the patronage of the house comes there rarely, or only on certain periodical occasions.[1] The question always is, as it is in the law of common carriers,[2] does he hold himself out to the public as ready to entertain all who apply? If he does so, he is an innkeeper.[3]

Boarding and lodging-house keepers are not innkeepers, because they are understood to take those only whom they desire, and generally for a fixed term;[4] nor is the private housekeeper who takes an occasional boarder for profit;[5] nor an eating house or restaurant keeper who provides food and drink only and not lodging.[6] But the word "restaurant" has no fixed legal meaning, though it currently means an eating house; if lodgings are provided as well, or if its real character is an inn, the name by which it goes is of little account.[7] One who is an innkeeper as to the general public, may by a special arrangement with individuals who come to remain for some length of time, become as to them a lodging or boarding house keeper.[8]

Boarding and lodging-house keepers are allowed to choose their own customers like any other private tradesman or person,[9] and their liability for the goods

1 Kisten *v.* Hildebrand, 9 B. Mon. 72; 48 Am. Dec. 416; Clary *v.* Willey, 49 Vt. 55.

2 As to which see § 83.

3 Howth *v.* Franklin, 20 Tex. 798; 73 Am. Dec. 218; Pinkerton *v.* Woodward, 33 Cal. 557; 91 Am. Dec. 657; Dickerson *v.* Rogers, 4 Humph. 179; 40 Am. Dec. 642.

4 Williard *v.* Reinhardt, 2 E. D. Smith, 48; Cromwell *v.* Stephens, 2 Daly, 15; Wintermute *v.* Clark, 5 Sand. 247; People *v.* Jones, 54 Barb. 311; Walling *v.* Potter, 35 Conn. 183; Kisten *v.* Hildebrand, 9 B. Mon. 72; 48 Am. Dec. 416; Mateer *v.* Brown, 1 Cal. 221; 52 Am. Dec. 303; Pollock *v.* Landis, 36 Iowa, 651; Smith *v.* Keyes, 2 Thomp. & C. 650.

5 Cady *v.* McDowell, 1 Lans. 484; State *v.* Matthews, 2 Dev. & B. 424; Lyon *v.* Smith, 1 Morris, 184; Howth *v.* Franklin, 20 Tex. 798; 73 Am. Dec. 218; Kisten *v.* Hildebrand, 9 B. Mon. 72; 48 Am. Dec. 416.

6 Carpenter *v.* Taylor, 1 Hilt. 193; Walling *v.* Potter, 35 Conn. 183; Doe *v.* Laming, 4 Camp. 77; R. *v.* Rymer, L. R. 2 Q. B. Div. 136; Kisten *v.* Hildebrand, 9 B. Mon. 73; 48 Am. Dec. 416.

7 Lewis *v.* Hitchcock, 10 Fed. Rep. 4; Kopper *v.* Willis, 9 Daly, 460.

8 Hall *v.* Pike, 100 Mass. 495; Pollock *v.* Landis, 36 Iowa, 651; Wiser *v.* Chesley, 53 Mo. 547; Cross *v.* Wilkins, 43 N. H. 332; Johnson *v.* Reynolds, 3 Kan. 257; Vance *v.* Throckmorton, 5 Bush, 41; 96 Am Dec. 327; Lawrence *v.* Howard, 1 Utah, 142; Taylor *v.* Downey, 62 N. W. Rep. 716 (Mich.).

9 Schoul. Bail. § 290; R. *v.* Rymer, 2 Q. B. Div. 136.

of their boarders or lodgers is that of an ordinary bailee for hire only.[1]

§ 73. **Duty to Receive the Public.**—The common law duties of innkeepers are exactly similar to those of common carriers.[2] The acts to be performed by these two classes of persons are different, but the principle of the imposed duty is the same. It is the duty of an innkeeper to receive and entertain a guest if he has room in his inn or hotel, just as it is a carrier's duty to convey a parcel if he has room in his vehicle.[3] And it is no excuse that the guest applies on Sunday, or at night after the innkeeper and family have gone to bed, or that the guest will not tell his name and abode;[4] or that the guest is a minor, or married woman traveling alone,[5] or that other persons of his calling had on former occasions been guilty of misbehavior in the inn.[6]

But reasons analagous to those which a common carrier may set up will justify the refusal of the innkeeper, —as for example, that the person desiring accommodation is a drunken or disorderly person; or one afflicted

1 Dausey *v.* Richardson, 3 El. & B. 144, Wiser *v.* Chesley, 53 Mo. 547; Johnson *v.* Reynolds, 3 Kan. 257; Smith *v.* Read, 52 How. Pr. 14; 6 Daly, 33; Jeffords *v.* Crump, 5 Week. N. C. 10; Vance *v.* Throckmorton, 5 Bush, 51; 96 Am. Dec. 327; Manning *v.* Wells, 9 Humph. 746; 51 Am. Dec. 688. In Smith *v.* Read, 6 Daly, 33, such a person was held liable for loss of a guest's goods by theft committed by a stranger whom the housekeeper employed by the proprietor negligently permitted to visit the guest's room.

2 As to which see § 89, *post.*

3 Broadwood *v.* Granara, 10 Ex. 423; Story Bail. § 476; Schoul. Bail. § 287; Hawthorn *v.* Hammond, 1 Car. & K. 404; R. *v.* Ivens, 7 Car. & P. 213; Com. *v.* Mitchell, 1 Phila. 63; Atwater *v.* Sawyer, 76 Me. 539; 49 Am. Rep. 634. A refusal without a valid excuse is indictable at common law: 2 Kent's Com. 592; R. *v.* Ivens, 7 Car. & P. 213; Story Bail. § 470, and under the statutes of some of the States; see N. Y. Code, § 381. He must give the guest a room if he has one, but not any particular room. Fell *v.* Knight, 8 M. & W. 269.

4 R. *v.* Ivens, 7 Car. & P. 213; Howell *v.* Jackson, 6 Car. & P. 725.

5 Watson *v.* Cross, 2 Duv. 147.

6 Atwater *v.* Sawyer, 76 Me. 539; 49 Am. Rep. 634.

with a contagious disease;[1] or a known thief;[2] or a filthy person, disagreeable to other guests;[3] or one who refuses to pay in advance;[4] or one whose intention is to commit an assault on a guest,[5] or injure the business of the innkeeper.[6] Nor is he bound to receive the guest's dog,[7] or to supply him with a room in which to carry on his trade or business;[8] or to receive such baggage of the guest as appears offensive or unsafe.[9]

§ 74. **Duty Only Towards Guests.**—Again, like the carrier of passengers whose duty is towards those only who are passengers, to render the innkeeper liable as such, the person whose property has been lost or damaged, or whose person has been injured, must be a guest. The question then as to who is to be considered as a guest becomes an important one.

It appears to be well settled that to constitute a person a guest he must be, or at least have the character of, a traveler.[10] The traveler is none the less a guest because he may have made a contract with the innkeeper for board by the week[11] or month;[12] nor does the length of time he remains alter his *status*, provided he

1 Moriarty *v.* Brooks, 6 Car. & P. 684; Howell *v.* Jackson, 6 Car. & P. 742; R. *v.* Ivens, 7 Car. & P. 213; Thompson *v.* Lacy, 3 Barn. & Ald. 287; and grounds for refusal to receive are good grounds, on their being subsequently discovered, of ejection; Howell *v.* Jackson, 6 Car. & P. 742: Com. *v.* Mitchell, 2 Pars. Cas. 431.

2 Markham *v.* Brown, 8 N. H. 523; 31 Am. Dec. 209.

3 *Id.*

4 9 Coke, 87 b; Bac. Abr., tit. Inns, C; Pinkerton *v.* Woodward, 33 Cal. 557; 91 Am. Dec. 657; Markham *v.* Brown, 8 N. H. 523; 31 Am. Dec. 209.

5 Markham *v.* Brown, *supra.*

6 *Id.*

7 R. *v.* Rymer, 2 Q. B. Div. 136.

8 Burgess *v.* Clements, 4 M. & S. 306.

9 Schoul. Bail. § 258, citing Kellogg *v.* Sweeney, 1 Lans. 400; Myers *v.* Cottrill, 5 Biss. 465; R. *v.* Rymer, 2 Q. B. Div. 136; Needles *v.* Howard, 1 E. D. Smith, 54.

10 Schoul. Bail. § 256; Story Bail. § 477; Bennett *v.* Mellor, 5 Term Rep. 273; Norcross *v.* Norcross, 53 Me. 163; Lusk *v.* Belote, 22 Minn. 468; Manning *v.* Wells, 9 Humph. 746; 51 Am. Dec. 688; Neil *v.* Wilcox, 4 Jones, 146; Towson *v.* Havre de Grace Bank, 6 Har. & J. 47; 14 Am. Dec. 254; McDaniels *v.* Robinson, 26 Vt. 316; 62 Am. Dec. 574; Read *v.* Amidon, 41 Vt. 15; 98 Am. Dec. 560.

11 Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417; Hall *v.* Pike, 100 Mass. 495; Norcross *v.* Norcross, 53 Me. 163; Jalie *v.* Cardinal, 35 Wis. 118; Smith *v.* Keyes, 2 N. Y. Sup. Ct. 650; Luna *v.* Dwinelle, 7 Alb. L. J. 44; Plum *v.* Jarnier, 3 Month. L. Bull. 36; Beale *v.* Posey, 72 Ala. 323; Shoecraft *v.* Bailey, 25 Iowa, 553; Ross *v.* Mellin, 36 Minn. 421.

12 Hancock *v.* Rand, 94 N. Y. 1; 46 Am. Rep. 112; Ross *v.* Mellin, 36 Minn. 421.

retains his character as a traveler;[1] nor the fact that he resides in the same town or city.[2] The distinction is well illustrated in a Minnesota case, where A's wife and children, after living some years in St. Paul, took board at a hotel in that city, and there A, who resided in another State, visited them, and during his visit, baggage of all was stolen. It was held that the hotel-keeper was liable for what was brought by A, but not for what was brought by the family.[3]

But if the inn is his permanent home, he lacks the requisites of a traveler, and he is not a guest, but only a boarder;[4] nor is one a guest who simply obtains refreshments at the bar or restaurant;[5] nor one who attends a ball given on the premises,[6] nor one using the inn to deposit his goods for safekeeping, who does not engage entertainment for himself.[7] And he must use the inn for a lawful purpose.[8]

§ 75. **Duty as to Guest's Person.**—As regards the person of the guest, while it does not seem to be required of the innkeeper the high care of a carrier of passengers, still he must see to it that the guest is not in-

1 Story Bail., § 477; Norcross *v.* Norcross, 53 Me. 169; Allen *v.* Smith, 12 Com. B., N. S., 638; Lusk *v.* Belote, 22 Minn. 468; Hancock *v.* Rand, 94 N. Y. 1; 46 Am. Rep. 112; Jalie *v.* Cardinal, 35 Wis. 118; Vance *v.* Throckmorton, 5 Bush 41; 96 Am. Dec. 327; Pinkerton *v.* Woodward, 33 Cal. 557; 91 Am. Dec. 657.

2 Walling *v.* Potter, 35 Conn. 183. In this case the Court said: "If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest and entitled to all the rights and privileges of one. In short, any one away from home receiving accommodations of an inn as a traveler is a guest."

3 Lusk *v.* Belote, 22 Minn. 468.

4 Lusk *v.* Belote, 22 Minn., 468; Manning *v.* Wells, 9 Humph. 746; 51 Am. Dec. 688; Neal *v.* Wilcox, 4 Jones, 146; 67 Am. Dec. 267.

5 R. *v.* Rymer, 2 Q. B. Div. 136; Fitch *v.* Casler, 17 Hun. 126; Gastenhofer *v.* Clair, 10 Daly, 265; see Kopper *v.* Willis, 9 Daly, 460; Houser *v.* Tully, 62 Pa. St. 92; 1 Am. Rep. 396.

6 Carter *v.* Hobbs, 12 Mich. 52; 83 Am. Dec. 762; Fitch *v.* Casler, 17 Hun., 126.

7 Arcade Hotel Co. *v.* Wiatt, 44 Ohio St. 32; 58 Am. Rep. 785; 4 N. E. Rep. 398; Gelley *v.* Clarke, Cro. Jac. 188; see Lynar *v.* Mossop, 36 U. C. Q. B. 220.

8 Curtis *v.* Murphy, 63 Wis. 4; 53 Am. Rep. 242; 22 N. W. Rep. 825.

jured through any want of reasonable care on his part while he is under his protection.[1] He is under a duty similar to that of the carrier of passengers to protect the guest's person against assaults by his servants,[2] and even by fellow guests, where he has an opportunity to do so.[3] So, where he allows a guest with a contagious disease to remain in his house, he is liable to other guests who thereby contract it.[4]

§ 76. **An Insurer of Guest's Property.**—The innkeeper is responsible for the safekeeping of property committed to his custody by a guest, as an insurer, unless the loss or injury be caused by the negligence or fraud of the guest, or by the act of God or the public enemy. This liability is recognized in the common law as existing by the ancient custom of the realm, and like that in the kindred case of the common carrier, had its origin in considerations of public policy. It was essential to the interests of the realm that every facility should be furnished for secure and convenient intercourse between different portions of the kingdom. The traveler was peculiarly exposed to depredation and fraud; he was compelled to repose confidence in a host who was subject to constant temptation, and favored with peculiar opportunities if he chose to betray his trust.[5] The innkeeper, is, therefore liable for the loss

[1] Sandys *v.* Florence, 47 L. J., C. P. D., 598.

[2] Wade *v.* Thayer, 40 Cal. 578.

[3] Rommel *v.* Schambacher, 120 Pa. St. 579; 6 Am. St. Rep. 732; 7 Atl. Rep. 779.

[4] Gilbert *v.* Hoffman, 66 Ia. 201; 55 Am. Rep. 263; 23 N. W. Rep. 632.

[5] Calye's Case, 8 Coke, 32; Mateer *v.* Brown, 1 Cal. 221; 52 Am. Dec. 303; Grinnell *v.* Cook, 3 Hill 487; 38 Am. Dec. 663; Walsh *v.* Porterfield, 87 Pa. St. 376; Ramaley *v.* Leland, 43 N. Y. 539; Hallenbake *v.* Fish, 8 Wend. 547; 24 Am. Dec. 88; Neal *v.* Wilcox, 4 Jones 146; 67 Am. Dec. 266; Pettigrew *v.* Barnum, 11 Md. 434; 69 Am. Dec. 212; Pinkerton *v.* Woodward, 33 Cal. 600; 91 Am. Dec. 657; Thickston *v.* Howard, 8 Blackf. 535; Sibley *v.* Aldrich, 33 N. H. 553; 66 Am. Dec. 745; Hulett *v.* Swift, 42 Barb. 249; 33 N. Y. 571; 88 Am. Dec. 405; Piper *v.* Manny, 21 Wend. 282; Mason *v.* Thompson, 9 Pick. 280; 20 Am. Dec. 471; Berkshire Woolen Co. *v.* Proctor, 7 Cush. 423; Richmond *v*, Smith, 8 Barn. & C. 9; Morgan *v.* Ravey, 6 Hurl. & N. 277; Day *v.* Bather, 2 Hurl & C. 14;

of his guest's property in the inn, even where it arises from a fire without his fault;[1] or from burglary, theft or robbery, whether it be by a stranger, a servant or a fellow guest.[2] He is bound by, and liable for the acts of his servants or those permitted to take their places,[3] within the scope of their authority.[4]

Shaw *v.* Berry, 31 Me. 478; 52 Am. Dec. 628; Norcross *v.* Norcross, 53 Me. 163; Shoecraft *v.* Bailey, 25 Iowa 553; Manning *v.* Wells, 9 Humph. 746; 51 Am. Dec. 688; Washburn *v.* Jones, 14 Barb. 198; Weisenger *v.* Taylor, 1 Bush, 275; 89 Am. Dec. 626; Burrows *v.* Trieber, 21 Md. 320; 83 Am. Dec. 590; Sassier *v.* Clark, 37 Ga. 242; Cashill *v.* Wright, 6 El. & B. 891; Oppenheim *v.* White Lion Hotel Co., L. R. 6 Com. P. 515; Fuller *v.* Coats, 18 Ohio St. 343; Williams *v.* Earle, 44 N. Y. 172; McDonald *v.* Edgerton, 5 Barb. 560; Cheesborough *v.* Taylor, 12 Abb. Pr. 227. In the English case of Dawson *v.* Champney, 5 Q. B. 174, it was held that the innkeeper is liable only for negligence, and the same view seems to have been taken in several cases in this country. See Newson *v.* Axon, 1 McCord, 509; 10 Am. Dec. 685; Towson *v.* Havre de Grace Bank, 6 Har. & J. 47; 14 Am. Dec. 254; Laird *v.* Eichold, 10 Ind. 212; 71 Am. Dec. 323; Baker *v.* Dessauer, 49 Ind. 31; reversing Dessauer *v.* Baker, 1 Wils. 431; Howth *v.* Franklin, 20 Tex. 798; 73 Am. Dec. 218; Cutler *v.* Bonney, 30 Mich. 259; 18 Am. Rep. 127; Vance *v.* Throckmorton, 5 Bush, 41; 76 Am. Dec. 327; Johnson *v.* Richardson, 17 Ill. 302; 63 Am. Dec. 369; Kisten *v.* Hildebrand, 9 B. Mon. 72; 48 Am. Dec. 416; Merrit *v.* Claghorn, 23 Vt. 177; Howe Machine Co. *v.* Pease, 49 Vt. 477; Metcalf *v.* Hess, 14 Ill. 129; McDaniels *v.* Robinson, 26 Vt. 316; 62 Am. Dec. 574. But Dawson *v.* Champney has been severely criticised both in England and America, and is not the law: See Morgan *v.* Ravey, 6 Hurl. & N. 277; Mateer *v.* Brown, 1 Cal. 221; 52 Am. Dec. 303. Where a guest's horse in the innkeeper's stable is injured by a horse of another guest the innkeeper is liable: Sibley *v.* Aldrich, 33 N. H. 553; 66 Am. Dec. 745. The innkeeper is held liable as such for a horse given into his care, although the owner is not a guest at the inn: Hilton *v.* Adams, 71 Me. 19; Yorke *v.* Grenaugh, 2 Ld. Raym. 866; Mason *v.* Thompson, 9 Pick. 280; 20 Am. Dec. 471; McDaniels *v.* Robinson, 26 Vt. 316; 62 Am. Dec. 574; Peet *v.* McGraw, 25 Wend. 653; Towson *v.* Havre de Grace Bank, 6 Har. & J. 47; 14 Am. Dec. 254. This rule is criticised in Grinnell *v.* Cook, 3 Hill 491; 38 Am. Dec. 663; Ingallsbee *v.* Wood, 33 N. Y. 541; 36 Barb. 452; Healey *v.* Gray, 68 Me. 489; 28 Am. Rep. 80.

1 Hulett *v.* Swift, 33 N. Y. 570; 88 Am. Dec. 405; Ingallsbee *v.* Wood, 33 N. Y. 577; 88 Am. Dec. 577.

2 Clute *v.* Wiggins, 14 Johns. 175; 7 Am. Dec. 449; Hancock *v.* Rand, 94 N. Y. 1; 46 Am. Rep 112; Houser *v.* Tully, 62 Pa. St. 92; 1 Am. Rep. 390; Walsh *v.* Porterfield, 87 Pa. St. 376; Dunbier *v.* Day, 12 Neb. 596; 41 Am. Rep. 772; 12 N. W. Rep. 109; Pinkerton *v.* Woodward, 33 Cal. 557; 91 Am. Dec. 657; Mateer *v.* Brown, 1 Cal. 221; 52 Am. Dec. 303.

3 Houser *v.* Tully, 62 Pa. St. 92; 1 Am. Rep. 390; Day *v.* Bather, 2 Hurl. & C. 14; Pinkerton *v.* Woodward, 33 Cal. 557; 91 Am. Dec. 657; Gile *v.* Libby, 36 Barb. 70; Weisinger *v.* Taylor, 1 Bush, 275; 89 Am. Dec. 626; Rockwell *v.* Proctor, 39 Ga. 105; Chamberlain *v.* Masterson, 26 Ala. 371; Smith *v.* Read, 52 How. Pr. 14.

4 Arcade Hotel Co. *v.* Wiatt, 44 Ohio St. 32; 54 Am. Rep. 785; 4 N. E. Rep. 398; Taylor *v.* Downey, 62 N. W. Rep. 716 (Mich.) where the hotelkeeper was simply a bailee, the plaintiff not being a guest, and it was said: "Such bailee is in no sense an insurer, as an innkeeper is sometimes said to be, of the property of his guest; but he may be held liable for negligence upon his own part, or the negligence of a servant, if such negligence amounts to a want of ordinary care. If a liability is to be based upon negligence, in this case, it

§ 77. **At What Time Liability Begins.**—Ordinarily, the liability of the innkeeper commences when the goods are placed in his custody within the inn. This does not mean that they must be specially put in his keeping; it is sufficient that they are placed within the walls of the inn or its custody,[1] or where his servants have directed them to be put.[2] So, where he voluntarily assumes to take them sooner; as where he furnishes transportation from a railroad station to his hotel for guests and their baggage;[3] or where a porter of the hotel takes them in charge at the station.[4]

§ 78. **At What Time Liability Ends.**—Where the relation of guest is established, the person is not obliged to remain in the inn to keep up the relation;

must be based upon a want of care in the employment of the night clerk, for it cannot be said that the clerk was negligent. On the contrary, he committed a felony by stealing the property, not only of the plaintiff, but the defendant also. It was done while in charge of the office by virtue of his employment. It was a complete and deliberate departure from his duty, and an entering upon an enterprise of his own, wholly outside of the scope of his employment. 'It was an illegal act, wilfully done, for which the employer cannot be required to respond.' See opinion of Patterson, J., in Lyons *v.* Martin, 8 Ad. & E. 512; Stevens *v.* Woodward, 50 L. J. C. P. 231; Foster *v.* Essex Bank, 17 Mass. 479; Bank *v.* Guelmartin, 88 Ga. 797, 15 S. E. Rep. 831; Comp *v.* Bank, 94 Pa. St. 409; Haggerty *v.* R. Co., 59 Mich. 366, 26 N. W. Rep. 639; Sutherland *v.* Ingalls, 63 Mich. 620, 30 N. W. Rep. 342; Mechem, Ag. 740, 741."

1 Bennett *v.* Mellor, 5 Term Rep. 275; Packard *v.* Northcraft, 2 Met. (Ky.) 439; Norcross *v.* Norcross, 53 Me. 163; Burrows *v.* Trieber, 21 Md. 320; 83 Am. Dec. 590; McDonald *v.* Edgerton, 5 Barb. 560; Epps *v.* Hinds, 27 Miss. 657; 61 Am. Dec. 528; Centhore *v.* Ryder, 1 Edm. Sel. Cas. 294; Cady *v.* Spencer, 4 F. & F. 306; Maloney *v.* Spencer, 33 Mo. (App.) 501; Clute *v.* Wiggins, 14 Johns. 175; 7 Am. Dec. 448. But see Albin *v.* Presby, 8 N. H. 408; 29 Am. Dec. 679. Where an innkeeper kept a bath-house separate from the inn it was held that he was not liable for goods of a guest stolen from there: Minor *v.* Staples, 71 Me. 316; 36 Am. Rep. 318, the Court saying: "We are not now speaking of bathrooms attached to or kept within hotels, but of separate buildings, erected upon the sea-shore, and used, not as bathrooms, but as places in which those who bathe in the sea change their garments, and leave their clothes and other valuables while so bathing. It seems to us that such an establishment is as distinct from an inn as a wharf or a boathouse would be; and that an innkeeper, as such, can no more be made responsible for property stolen from such a bathhouse than he could be for property stolen from a wharf or a boathouse, if he happened to be the keeper of the latter as well as the former."

2 Piper *v.* Manny, 21 Wend. 282; Jones *v.* Tyler, 3 Nev. & M. 576.

3 Dickinson *v.* Winchester, 4 Cush. 114; 50 Am. Dec. 760.

4 Sassen *v.* Clark, 37 Ga. 242.

so long as he has not signified his intention of leaving, and remains responsible for the charges, he may absent himself, but the innkeeper's liability continues as to his goods, as before.[1] Where the innkeeper undertakes to deliver the guest's goods at some place outside, as for example at a railroad station, his liability continues until they are so delivered.[2] But he is not liable where the guest directs the property to be deposited at a place outside the inn, and it is afterwards injured there.[3] Even when he departs for good, leaving his goods to be called for, the innkeeper's liability continues for a reasonable time, *i. e.*, a reasonable time in which he may remove them.[4]

§ 79. **For What Property Responsible.**—Unlike the case of the carrier, the innkeeper's responsibility is not limited to "baggage,"[5] but extends to all goods and chattels which the guest may bring to the inn,[6]

[1] McDaniels *v.* Robinson, 26 Vt. 316; 62 Am. Dec. 574; 28 Vt. 389; 67 Am. Dec. 72. It is said that in the case of an animal which the innkeeper by feeding and taking care of may continue to make a profit, he remains liable for such after the guest departs leaving it in his hands. McDaniels *v.* Robinson, *supra.*

[2] Sassen *v.* Clark, 37 Ga. 242; Giles *v.* Fauntleroy, 13 Md. 126.

[3] Hanley *v.* Smith, 25 Wend. 642.

[4] Seymour *v.* Cook, 53 Barb. 451; Adams *v.* Clem, 41 Ga. 65; 5 Am. Rep. 524; Murray *v.* Clarke, 2 Daly 102; Giles *v.* Fauntleroy, 13 Md. 126; Miller *v.* Peeples, 60 Miss. 819; 48 Am. Rep. 423; Bendetson *v.* French, 46 N. Y. 266; O'Brien *v.* Vaill, 22 Fla. 627; Murray *v.* Marshall, 9 Colo. 402; 59 Am. Rep. 152; 13 Pac. Rep. 589; Seymour *v.* Cook, 53 Barb. 451; see Whitemore *v.* Haroldson, 2 Lea. 312; Stewart *v.* Head, 70 Ga. 449. But where the guest is ordered to leave the inn for not paying his board, and departs leaving his baggage, the innkeeper is a bailee without reward as to it: Lawrence *v.* Howard, 1 Utah 142.

[5] See the legal meaning of that term, *post*, § 272.

[6] Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417; Armistead *v.* Wilde, 17 Q. B. 261; Kent *v.* Shuckard, 2 Barn & Adol. 803; Epps *v.* Hinds, 27 Miss. 658; 61 Am. Dec. 528; Kellogg *v.* Sweeney, 1 Lans. 397; Wilkins *v.* Earle, 44 N. Y. 172; 4 Am. Rep. 665; Snider *v.* Geiss, 1 Yeates, 34; Taylor *v.* Moonot, 4 Duer. 116; Needles *v.* Howard, 1 E. D. Smith 54; Van Wycks *v.* Howard, 12 How. Pr. 147; Hilton *v.* Adams, 71 Me. 19; Pinkerton *v.* Woodward, 33 Cal. 557; 91 Am. Dec. 688; Smith *v.* Wilson, 36 Minn. 334; 31 N. W. Rep. 176; *contra*, restricting the liability to "baggage," see Pettigrew *v.* Barnum, 11 Md. 434; 69 Am. Dec. 213; Giles *v.* Fauntleroy, 13 Md. 126; Treiber *v.* Burrows, 27 Md. 130; Maltby *v.* Chapman, 25 Md. 310; Sassen *v.* Clark, 37 Ga. 242; Simon *v.* Miller, 7 La. Ann. 360; Profilet *v.* Hall, 14 La. Ann. 524; Myers *v.* Cottrill, 5 Biss. 465; Neal *v.* Wilcox, 4 Jones, 146; 67 Am. Dec. 266.

either on his first arrival, or while he is a guest.[1] The innkeeper is not liable, however, for property brought to the inn, not for shelter, but to prosecute a trade or occupation there.[2]

§ 80. **Contributory Negligence of Guest.**—The guest's contributory negligence may bar his recovery, and this may take place either in his failing to apprise the innkeeper that his goods are peculiarly liable to injury,[3] or in his not using towards them the ordinary care that a prudent man would reasonably be expected to have used.[4] It has been held not negligence *per se* for a guest to keep money and valuables by him, instead of depositing them in the inn safe;[5] nor to neglect to lock his door, though furnished with a key;[6] nor to be intoxicated, and thereby not hear a thief who gets into his room at night;[7] nor not to inform the inn-

1 Pinkerton *v.* Woodward, 33 Cal. 557; 91 Am. Dec. 658.

2 Burgess *v.* Clements, 4 Maule & S. 306; Myers *v.* Cottrill, 5 Biss. 465; Mowers *v.* Fethers, 61 N. Y. 34; 19 Am. Rep. 244.

3 Healey *v.* Gray, 68 Me. 489; 28 Am. Rep. 60. But see Shoecraft *v.* Bailey, 25 Ia. 553, where it was held that the guest was not negligent in not informing the clerk when depositing his pocket-book with him that it contained money; and see Rubenstein *v.* Cruikshanks, 54 Mich. 190; 52 Am. Rep. 806; 16 N. W. Rep. 954.

4 Cashill *v.* Wright, 6 El. & B. 891, per Erle, J.; Oppenheim *v.* White Lion Hotel Co., L. R. 6 Com. P. 515; Classen *v.* Leopold, 2 Sweeny 205; Purvis *v.* Coleman, 21 N. Y. 111; Jalie *v.* Cardinal, 35 Wis. 118; Kelsey *v.* Berry, 42 Ill. 469; Fuller *v.* Coats, 18 Ohio. St. 343; Chamberlain *v.* Masterson, 26 Ala. 371; Elcox *v.* Hill, 98 U. S. 218; Hadley *v.* Upshaw, 27 Tex. 547; 86 Am. Dec. 654; Fowler *v.* Dorlon, 24 Barb. 384; Johnson *v.* Richardson, 17 Ill. 302; 63 Am. Dec. 369; Profilet *v.* Hall, 14 La. Ann. 524; Burgess *v.* Clements, 4 Maule & S. 306; Armistead *v.* Wilde, 17 Q. B. 261; Burrows *v.* Trieber, 21 Md. 320; 83 Am. Dec. 590; Read *v.* Amidon, 41 Vt. 15; 98 Am. Dec. 560.

5 Jalie *v.* Cardinal, 35 Wis. 118; Weisenger *v.* Taylor, 1 Bush, 275; 89 Am. Dec. 627; Berkshire Woolen Mill Co. *v.* Proctor, 7 Cush. 417; Johnson *v.* Richardson, 17 Ill. 302; 63 Am. Dec. 369; Schoul. Bail., § 275; Calye's Case, 8 Coke 32; Pope *v.* Hall, 14 La. Ann. 324; Smith *v.* Wilson, 36 Minn. 334; 31 N. W. Rep. 176; see Purvis *v.* Coleman, 21 N. Y. 111.

6 Cayle's Case, 8 Coke 32; Mitchell *v.* Woods, 16 L. T., N. S., 671; Classen *v.* Leopold, 10 Mo. App. 235; Buddenburg *v.* Benner, 1 Hilt. 84; Filipowski *v.* Merryweather, 2 Fost. & F. 285; Spring *v.* Hager, 145 Mass. 186; 13 N. E. Rep. 439; Bohler *v.* Owens, 60 Ga. 185.

7 Walsh *v.* Porterfield, 87 Pa. St. 376. In Rubenstein *v.* Cruikshanks, 54 Mich. 199, 52 Am. Rep. 806; 16 N. W. Rep. 954; it was ruled that it was no defense that the guest was drunk. "The fact," said the Court, "that the plaintiff got intoxicated at the bar of the landlord should, if anything, cause him to be held to a stricter liability."

keeper that there is no lock on the door of his room;[1] nor to consent to share a room with a stranger;[2] nor to leave his valise in the bar room instead of taking it to his room;[3] nor to put his clothes and watch on the lounge in his bedroom or leave his money in his pocket-book with his clothes.[4] But such acts may be evidence of negligence, justifying a jury in finding against the guest.[5]

§ 81. **Limitation of Innkeeper's Liability.**—The innkeeper has a right to notify the guest that money or valuables must be specially deposited with him, or he will not be liable, and such notices will protect the innkeeper[6] except as to losses occurring through his negligence.[7] It is essential, however, that such notices be shown to have been brought to the knowledge of the guest.[8] Where the proof does not go further than to show that the notice was posted in the guest's room,[9] or was printed on the hotel register,[10] it is insufficient to charge the guest. The innkeeper's common law liability is not affected by his posting notices in his house that he will be liable for the goods of the guest only on certain conditions.[11]

By statute in a number of States, the innkeeper, by posting a notice in the manner provided, that money

1 Lanier *v.* Youngblood, 73 Ala. 587.

2 Olson *v.* Crossman, 31 Minn. 222; 17 N. W. Rep. 375.

3 Packard *v.* Northcraft, 2 Met. (Ky.) 439.

4 Murchison *v.* Sergent, 69 Ga. 206; 47 Am. Rep. 754.

5 Jalie *v.* Cardinal, 35 Wis. 118; Oppenheim *v.* White Lion Hotel Co., L. R. 6 Com. P. 515; Burgess *v.* Clements, 4 Maule & S. 310; Spice *v.* Bacon, 36 L. T., N. S., 896; Armistead *v.* Wilde, 17 Q. B. 261; Herbert *v.* Markwell, Q. B. Div. 1881, cited Laws. Rights, Rem. & Pr., § 135.

6 Purvis *v.* Coleman, 21 N. Y. 111; Fuller *v.* Coats, 18 Ohio St. 343; Vance *v.* Throckmorton, 5 Bush 41; 96 Am. Dec. 327; Packard *v.* Northcraft, 2 Met. (Ky.) 439; Van Wyck *v.* Howard, 12 How. Pr. 127; Wilson *v.* Halpin, 30 How. Pr. 124.

7 Schoul. Bail., § 279.

8 Purvis *v.* Coleman, 21 N.Y. 111; Fuller *v.* Coats, 18 Ohio St. 343; Read *v.* Amidon, 41 Vt. 15; 98 Am. Dec. 560.

9 Morgan *v.* Ravey, 6 H. & N. 265; Bodwell *v.* Bragg, 29 Iowa, 232.

10 Bernstein *v.* Sweeney, 33 N.Y. Sup. Ct. 271; Milford *v.* Wesley, 1 Wils. (Ind.) 119.

11 Bodwell *v.* Bragg, 29 Ia. 232; Woodward *v.* Birch, 4 Bush, 510.

or valuables are to be deposited with him, escapes liability if they are lost or stolen after the guest has omitted to so deposit them.[1] But the innkeeper is liable as such for the loss of such valuables before the guest has had an opportunity of depositing them, and after he has received the deposit back and it is packed in his trunk awaiting his departure from the hotel[2]

In other States he is not liable, after giving notice to that effect, for goods stolen from a room left unlocked by the guest.[3] In another, he is liable only for "baggage;"[4] in another, he is not liable for merchandise kept for sale or sample, by a guest, unless the latter gives him written notice thereof.[5]

In other States, the liability of the innkeeper for losses by fire is restricted to fire caused by the acts of himself or his servants;[6] in another, his liability is restricted to five hundred dollars.[7]

To obtain the advantages of their limitations, the provisions of the statutes must be strictly followed;[8] if they require notices to be posted in bedrooms, a notice anywhere else is of no effect.[9]

[1] Stim. Am. Stat. L., § 523. Such statutes are in force in Alabama, California, Delaware, Dakota, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee and Wisconsin. Elcox *v.* Hill, 98 U. S. 218; Wilkins *v.* Earle, 44 N. Y. 172; 4 Am. Rep. 655. Having deposited the valuables as required, the innkeeper is liable, notwithstanding the largeness of the amount. Wilkins *v.* Earle, 44 N. Y. 172; 4 Am. Rep. 655. It is generally held that the statute does not extend to everything in the way of money and jewelry the guest may have, but only what is beyond his ordinary necessities from day to day. Bernstein *v.* Sweeney, 33 N. Y. Sup. Ct. 271; Maltby *v.* Chapman, 25 Md. 310; Milford *v.* Wesley, 1 Wils. (Ind.) 119; Murchison *v.* Sergent, 69 Ga. 206; 47 Am. Rep. 754; Krohn *v.* Sweeney, 2 Daly 200; see Hyatt *v.* Taylor, 42 N. Y. 258; Rosenfleuter *v.* Roessle, 54 N. Y. 262; overruling Gile *v.* Libby, 36 Barb. 70; Ramaley *v.* Leland, 43 N. Y. 540; 3 Am. Rep. 728; overruled in Rosenfleuter *v.* Roessle, *supra*.

[2] Bendetson *v.* French, 46 N. Y. 270.

[3] Pa. Stat. Inns. 19; Del. V. 14. 447.

[4] Noble *v.* Milliken, 77 Me. 359.

[5] Fisher *v.* Kelsey, 16 Fed. Rep. 71; 121 U. S. 383; Becker *v.* Haynes, 29 Fed. Rep. 441.

[6] Mo. R. S. 1879, § 5786; Wis. R. S. § 1726; N. Y. Act. 1866, c. 638. See Faucett *v.* Nichols, 4 Th. & C. 597.

[7] N. Y. Stats. 1883, c. 227.

[8] Lanier *v.* Youngblood, 73 Ala. 587; Beale *v.* Posey, 72 Ala. 323; Fisher *v.* Kelsey, 16 Fed. Rep. 71; 121 U. S. 383.

[9] Batterson *v.* Vogel, 8 Mo. (App.) 24; Olson *v.* Crossman, 31 Minn. 222; 17 N. W. Rep. 375.

§ 82. **The Innkeeper's Lien.** — The innkeeper's lien[1] extends to all property entrusted to him by the guest, even though it may not belong to him, provided the innkeeper does not know the real state of the case;[2] and even though they are goods which the innkeeper was not bound by law to receive;[3] or are chattels exempt from execution.[4] The property must be received by the innkeeper from a traveler or guest, in order to create a lien,[5] but it extends to the horses and carriages of the guest both for the charges for their keep, and for the guest's personal entertainment.[6]

1 For a general explanation of the lien of a bailee see *ante* § 27.

2 Dunlap *v.* Thorne, 1 Rich. 213; Grinnell *v.* Cook, 3 Hill 488; 38 Am. Dec. 633; Manning *v.* Hollenbeck, 27 Wis. 202; Nichols *v.* Halliday, 27 Wis. 406; Johnson *v.* Hill, 2 Stark. 172; Cook *v.* Kane, 13 Oregon; 57 Am. Rep. 28; 11 Pac. Rep. 226; Covington *v.* Newberger, 99 N. C. 523; 6 S. E. Rep. 205; Fox *v.* McGregor, 11 Barb. 41; King *v.* Richards, 6 Whart. 418. Where a statute restricts the lien to the "baggage or other valuables of the guest "the innkeeper may have a lien for storage charges on property of third persons brought to the inn by the guest. Wyckoff *v.* South. Hotel Co. 24 Mo. (App.) 382.

3 Berkshire Woolen Co. *v.* Procter, 7 Cush. 417.

4 Swan *v.* Bournes, 47 Ia. 501; 29 Am. Rep. 492.

5 Hurst *v.* Byers, 29 Mo. 496; Pollock *v.* Landis, 36 Ia. 651; Ewart *v.* Stark, 8 Rich. 423. By statute in some States the lien is extended to boarding-house keepers.

6 Fox *v.* McGregor, 11 Barb. 41; Pollock *v.* Landis, *supra*; Mason *v.* Thompson, 9 Pick. 280; 20 Am. Dec. 471; McDaniels *v.* Robinson, 36 Vt. 316; 62 Am. Dec. 574; Peet *v.* McGraw, 25 Wend. 683.

PART II.

THE COMMON CARRIER OF GOODS.

CHAPTER IX.

INTRODUCTORY.

SECTION 83. Who are Common Carriers.
84. The Different Classes of Common Carriers.
85. Who are not Common Carriers.
86. Carriers of Live Animals.
87. Divisions of the Subject.

§ 83. **Who are Common Carriers.** — A common carrier is one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place.[1] In the leading case in England of *Nugent* v. *Smith*,[2] it is said that the test as to whether one is a common carrier or not is "whether he holds out, either expressly or by a course of conduct, that he will carry for hire so long as he has room, the goods of all persons indifferently, who send him goods to be carried," and this is the test applied in a large majority of the American cases.[3]

1 Parker, C, J.. in Dwight *v.* Brewster, *post*, Mr. Justice Clifford in The Niagara *v.* Cordes, 21 How. 7; Moss *v.* Beattie, 4 Heisk. 661; 13 Am. Rep. 1 (1871); Dwight *v.* Brewster, 1 Pick. 50; 11 Am. Dec. 133; The Niagara *v.* Cordes, 21 How. 7; Gisbourn *v.* Hurst, 1 Salk. 249; McClures *v.* Hammond, 1 Bay 99; 1 Am. Dec. 598; Craig *v.* Childress, Peck. 270; 14 Am. 14 Am. Dec. 751; Robertson *v.* Kennedy, 2 Dana 430; 26 Am. Dec. 466; Doty *v.* Strong, 1 Pinn. 313; 40 Am. Dec. 773; Fish *v.* Chapman, 2 Ga. 349; 46 Am. Dec. 393; Verner *v.* Switzer, 32 Pa. St. 208. The definition of Parker, C. J., is regarded as the most concise, and is adopted in many adjudged cases. In Gisbourn *v.* Hurst, 1 Salkeld, 249, he is said to be "any man undertaking for hire to carry the goods of all persons indifferently." This is said by Gibson, C. J., in Gordon *v.* Hutchinson, 1 Watts & S. 285, to be "the best definition of a common carrier in its application to the business of this country." For other definitions see 2 Kent Com. 598; Story Bail. § 495; Hutch. Carr. § 47.

2 L. R. 1. C. P. Div. 19.

3 Fish *v.* Clarke, 2 Lans. 176; 49 N. Y. 122; Allen *v.* Sackrider, 37 N. Y. 341; Dwight *v.* Brewster, 1 Pick. 50; 11 Am. Dec. 133; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story 17; Satterlee *v.* Groat, 1 Wend. 272; Chevallier *v.* Straham, 1 Tex. 115; 47 Am. Dec. 639; Samms *v.* Stewart, 20 Ohio 69; 55 Am. Dec. 445; Steele *v.* McTyer, 31 Ala. 667; 70 Am. Dec. 516; Mershon *v.* Habensock, 22 N. J. L. 372; Harrison *v.* Roy, 39 Miss. 396; The Dan, 40 Fed. Rep. 691.

Where a person does not come within this test—as where he is not in the business of carrying, but is employed to undertake the carriage of another's goods on a particular occasion,[1] he is a mere private carrier, liable only as a bailee for hire,[2] for the want of ordinary diligence,[3] and able (unlike the common car-

[1] Fish *v.* Clark, 2 Lans. 176; 49 N.Y. 122; Allen *v.* Sackrider, 37 N. Y. 341; Pike *v.* Marsh, 3 Abb. App. 610; Pennewell *v.* Cullen, 5 Harr. (Del.) 238; Self *v.* Dunn, 42 Ga. 528; 5 Am. Rep. 544. In the leading American case of Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393, the defendant was a farmer who was employed by the plaintiff to carry his goods to a certain place, and while crossing a stream his wagon was upset and the goods injured. It was held that he was not a common carrier nor liable as such. In Nugent *v.* Smith, *ante*, Brett, J., refers to this case as "a powerful and business-like judgment." A contrary doctrine is laid down in Pennsylvania in Gordon *v.* Hutchinson, 1 W. & S. 285; 37 Am. Dec. 464, and Chouteau *v.* Leach, 18 Pa. St. 224; 57 Am. Dec. 602. See also Powers *v.* Davenport, 7 Blackf. 497; 43 Am. Dec. 100; McClure *v.* Richardson, Rice, 215; Morris *v.* Norris, 4 N. H. 304; Chevallier *v.* Straham, 2 Tex. 115. Mr. Hutchinson (Carr., § 52), after a review of the four cases from Blackf., Rice, 4 N. H. and 2 Tex., which are uniformly cited with Gordon *v.* Hutchinson as giving support to the position there taken, that one may become a common carrier from a casual employment *pro hac vice*, concludes that they will be found upon examination to add but little if any weight to that view of the question. In Moss *v.* Bettis, 4 Heisk., 661; 13 Am. Rep. 1 (a case in its facts much like Fish *v.* Clark and Fish *v.* Chapman) the defendant was a farmer who "after his crops were laid by" would run boats for himself or any one else who would employ him. He had built a flat-boat to transport to market a cargo of his own staves, but at the instance of the plaintiff, abandoned that project and loaded his own and another boat furnished by the plaintiff with the plaintiff's lumber, and undertook to carry it by river to market. The boats struck some obstruction in the river and were sunk, occasioning the loss of some of the lumber. The Supreme Court of Tennessee held that the defendant was a common carrier in the service he had undertaken and liable as such. Citing Craig *v.* Childress, Peck, 270; Johnson *v.* Friar, 4 Yerg., 48; Jordan *v.* Buchanan, 5 Yerg., 71; Turney *v.* Wilson, 7 Yerg., 340. Noticing this case, at some length, Mr. Hutchinson (Carr., § 52), then a member of the Tennessee bar, says: "This exception by the Tennessee courts to the common law, which has brought into the family of common carriers a class which does not properly belong there, seems to be confined to carriers by river craft, and to have been first made because the prevalence of this mode of transportation seemed to make it necessary that such carriers should be held to a stricter accountability than mere private carriers. To this extent it is still adhered to as established by precedent, although it may now and then occasion a hardship to the accommodating carrier, even when he is not to blame, as it seems to have done in the case last stated. As to carriers by land, the rule seems to be as at common law. Walker *v.* Skipwith, Meigs, 502."

[2] See *ante*, § 49, or if he carry gratuitously, liable only as a gratuitous bailee; Coggs *v.* Bernard, *ante;* Hutton *v.* Osborne, 1 Sel. N. P. 452; Colyar *v.* Taylor, 1 Cold, 372; Jenkins *v.* Motlow, 1 Sneed, 248; Nelson *v.* Mackintosh, 1 Stark. 237; Adams Ex. Cr. *v.* Cressap, 6 Bush, 572; Fay *v.* The New World, 1 Cal. 348; Pender *v.* Robbins, 6 Jones, 207.

[3] *Ante* § 49; Coggs *v.* Bernard, *ante;* Rogers *v.* Head, Cro Jac. 262; Brind *v.* Dale, 8, C. & P. 207; Caleff *v.* Danvers, 1 Peake, N. P. 114; Whalley *v.* Wray, 3 Esp. 74; Robinson v. Dunmore, 2 B. & P. 416; Bowman *v.* Teall, 23 Wend. 306.

rier, as we shall see),[1] to get rid of his responsibility, except for fraud, by contract with his employer.[2]

§ 84. **The Different Classes of Common Carriers.** —The common carrier, exercising as he does his calling on land and water, with the aid of steam, horse or other power, is known by a variety of names. Therefore, boatmen of every description—lightermen, hoymen, bargemen, or however called—upon rivers, lakes or the sea,[3] canal boatmen and canal companies,[4] city express companies engaged in carrying baggage or other goods from and to railroad stations, private houses and hotels,[5] owners of land vehicles not employed on any regular line, but used for the carriage of goods for hire to places in the same or a near neighborhood, as draymen, carters, truckmen, wagoners,[6] expressmen and express companies, or transportation companies forwarding goods from place to place for hire, either in their own conveyances, or in conveyances owned and managed by others;[7] ferrymen (as to the

1 Post § 136.

2 Wells *v.* Steam Nav. Co., 2 Comst. 204; Alexander *v.* Greene, 3 Hill, 9.

3 Story Bail. § 496; Harvey *v.* Rose, 26 Ark. 3; 7 Am. Rep. 595; Wyckoff *v.* Queens Co. Ferry Co., 52 N. Y. 32; 11 Am. Rep. 650; Ingate *v.* Christie, 3 C. & K. 61

4 Harrington *v.* Lyles, 2 Nott & McC. 88; Williams *v.* Bronson, 1 Murph. 417; 4 Am. Dec. 562; Spencer *v.* Daggett, 2 Vt. 92; Fuller *v.* Bradley, 25 Pa. St. 120; De Mott *v.* Laraway, 14 Wend. 225; 28 Am. Dec. 523; Parsons *v.* Hardy, 14 Wend. 215, 28 Am. Dec. 521; Hyde *v.* Trent. Nav. Co., 5 T. R. 389; Trent Nav. Co. *v.* Wood, 3 Esp. 127; Arnold *v.* Hallenbake, 5 Wend. 33; Bowman *v.* Teall, 23 Wend. 306; Humphreys *v.* Reed, 6 Whart. 435. But see Penn. Canal Co. *v.* Burd, 90 Pa. St. 281; 35 Am. Rep. 659; Watts *v.* Canal Co., 64 Ga. 88; 37 Am. Rep. 53.

5 Richards *v.* Westcott, 2 Bosw. 589; Verner *v.* Sweitzer, 32 Pa. St. 208.

6 Story on Bail. § 496; 2 Kent Com. 598; Richards *v.* Westcott, 2 Bosw. 589; Gordon *v.* Hutchinson, 1 Watts & S. 285; 37 Am. Dec. 464; Robertson *v.* Kennedy, 2 Dana 430; 26 Am. Dec. 466; Chevallier *v.* Straham, 2 Tex. 115; 47 Am. Dec. 639; Philleo *v.* Sanford, 17 Tex. 227; 67 Am. Dec. 654; Seligman *v.* Armijo, 1 N. M. 459. Whether a drayman or truckman who carries goods from one part of the city to another is a common carrier is *quaeried* in Charles *v.* Lasher, 20 Ill. (App.) 36.

7 Buckland *v.* Adams Ex. Co., 97 Mass. 124; 93 Am. Dec. 68; Christenson *v.* American Express Co., 15 Minn. 270; 2 Am. Rep. 122; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; Sherman *v.* Wells, 28 Barb. 403; Baldwin *v.* American Express Co., 23 Ill. 197; 74 Am. Dec. 190, Read *v.* Spaulding, 5 Bosw. 395; Haslam

baggage of their passengers, and as to all goods or chattels which they make it their business to transport);[1] hackmen and cab drivers,[2] omnibus lines and proprietors,[3] horse and street railroads,[4] railroads whose motive power is steam or electricity,[5] ships and vessels,[6]

v. Adams Express Co., 6 Bosw. 235; Sweet *v.* Barney, 23 N. Y. 335; Verner *v.* Sweitzer, 32 Pa. St. 208; Southern Express Co. *v.* Newby, 36 Ga. 635; 91 Am. Dec. 783; Richards *v.* Westcott, 2 Bosw. 589; Stadhecker *v.* Combs, 1 Rich. 193; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; Gulliver *v.* Adams Express Co., 38 Ill. 503; Mercantile Ins. Co. *v.* Chase, 1 E. D. Smith, 115; U. S. Express *v.* Buchanan, 28 Ohio St. 144; Hayes *v.* Wells, 23 Cal. 185; 83 Am. Dec. 89; Am. Express Co. *v.* Hockett, 30 Ind. 250; 95 Am. Dec. 691; Merchants' Dispatch Trans. Co. *v.* Bloch, 86 Tenn. 392; 6 Am. St. Rep. 847; 6 S. W. Rep. 881; Overland Mail Co. *v.* Carroll, 7 Colo. 43; 1 Pac. Rep. 362; South. Ex. Co., *v.* Hess, 53 Ala., 19; Krender v. Wolcott, 1 Hilt. 223. *Contra*, the early case of Roberts *v.* Turner, 12 Johns. 232; 7 Am. Dec. 311; and see Hooper *v.* Wells, 27 Cal. 11; 85 Am. Dec. 211.

1 Sanders *v.* Young, 1 Head, 219; 73 Am. Dec. 175; Cohen *v.* Hume, 1 McCord 439; Pomeroy v. Donaldson, 5 Mo. 36; Albright *v.* Penn, 14 Tex. 290; Claypool *v.* McAllister, 20 Ill. 504; Fisher *v.* Clisbee, 12 Ill. 344; Wilson *v.* Hamilton, 4 Ohio St. 722; Harvey *v.* Rose, 26 Ark. 3; 7 Am. Rep. 595; Powell *v.* Mills, 37 Miss. 691; Hall *v.* Renfro, 3 Met. (Ky.) 51; Self *v.* Dunn, 42 Ga. 528; 5 Am. Rep. 544; Cook *v.* Gourdine, 2 Nott & McC. 19; Whitmore *v.* Bowman, 4 G. Greene 148; Babcock *v.* Herbert, 3 Ala. 392; 37 Am. Dec. 695; Miller *v.* Pendleton, 8 Gray 547; Smith *v.* Seward, 3 Pa. St. 342; Griffith *v.* Cave, 22 Cal. 535; 83 Am. Dec. 82; May *v.* Hanson, 5 Cal. 360; 63 Am. Dec. 135; Littlejohn *v.* Jones, 2 McMull 365; 39 Am. Dec. 132; White *v.* Wimisimmet Co., 7 Cush. 155.

2 Bonce *v.* R. R. Co., 53 Iowa 278; 36 Am. Rep. 221, 5 N. W. Rep. 177; Lemon *v.* Chansler, 68 Mo. 340; 30 Am. Rep. 799.

3 Parmelee *v.* McNulty, 19 Ill. 556; Parmelee *v.* Lowitz, 74 Ill. 116; 24 Am. Rep. 276; Dibble *v.* Brown, 12 Ga. 217; 56 Am. Dec. 460. By statute in Iowa, Code, § 2183. In the first case the Court said that it was "authorized to take notice that the owner of an omnibus line is a common carrier just as much as the owner of a railroad or a line of steamboats."

4 Levy *v.* R. R. Co., 11 Allen, 300; 87 Am. Dec. 713.

5 Story on Bailments, § 496; Southwestern R. Co. *v.* Webb, 48 Ala. 585; Norway Plains Co. *v.* R. Co., 1 Gray 263; 61 Am. Dec. 423; Chicago etc. R. Co. *v.* Thompson, 19 Ill. 578; Fuller *v.* R. Co., 21 Conn. 570; Jones *v.* R. Co., 27 Vt. 399; 65 Am. Dec. 206; Rogers Loc. Works *v.* R. Co., 20 N. J. Eq. 379; Selma etc. R. Co. *v.* Butts, 43 Ala. 385; 94 Am. Dec. 694; Fahey *v.* R. Co., 76 Ga. 597; 2 Am. St. Rep. 58. A railroad company receiving freight before the road is completed, and when it is only running construction trains is a common carrier. Little Rock, M. Ry. Co. *v.* Glidewell, 39 Ark. 487. It has been held that if the owner of the goods, by contract with a railroad, hire from it cars for the loading and transportation of the goods, the road agreeing to furnish the motive power and the use of its road only in the transportation, the railroad, in thus transporting the goods, does not do so in the capacity of common carrier, and that it will not be held liable for any loss or damage to the goods, under such circumstances, not occasioned by its negligence. East Tenn. etc. R. Co. *v.* Whittle, 27 Ga. 535; Kimball *v.* R. R. Co., 26 Vt. 247; Ohio, etc. R. Co. *v.* Dunbar, 20 Ill. 623. Nor a railroad contracting to transport a menagerie in cars owned and controlled by the owners of the menagerie. Coup *v.* Wabash etc. R. Co., 56 Mich. 111; 56 Am. Rep. 111; 22 N. W. Rep. 215. But in other cases it is ruled that under such circumstances, the railroad company is still liable, as a common carrier, for the safety of the goods. Malloy *v.* R. R. Co., 33 Barb. 481; Hannibal etc. R. Co. *v.* Swift, 12 Wall. 262.

6 Morse *v.* Slue, 1 Vent. 190; Laveroni

whether the transportation be from port to port within the same country, or beyond the sea,[1] these including sailing ships or steam vessels engaged in the coasting trade or upon the lakes or navigable rivers;[2] and stage coach proprietors,[3] are all common carriers. In Colo-

v. Drury, 8 Ex. 166; Boson *v.* Sanford, 2 Salk. 440; Clark *v.* Barnwell, 12 How. 272; The Niagara *v.* Cordes, 21 How. 7; The Delaware, 14 Wall. 579; The Maggie *v.* Hammond, 9 Wall. 435; King *v.* Shepherd, 3 Story 349; Hastings *v.* Pepper, 11 Pick. 41; Gage *v.* Terrell, 9 Allen 299.

1 Elliot *v.* Russell, 10 Johns 1; 6 Am. Dec. 306.

2 Williams *v.* Branson, 1 Murph. 417; 4 Am. Dec. 562; Gilmore *v.* Carman, 1 Smedes & M. 279; 40 Am. Dec. 96; Swindler *v.* Hilliard, 2 Rich. 286; 45 Am. Dec. 732; The Reeside, 2 Sum. 567; Crosby *v.* Fitch, 12 Conn. 410; 31 Am. Dec. 345; McClure *v.* Hammond, 1 Bay. 99; The Emma Johnson, 1 Sprague, 527; Oakey *v.* Russell, 18 Mart. (La.) 58; Parker *v.* Flagg, 26 Me. 181; 45 Am. Dec. 101; The Propeller Commerce. 1 Black. 582; The Niagara *v.* Cordes, 21 How. 26; Clark v. Barnwell, 12 *id.* 272; The Commander-in-Chief, 1 Wall. 51; Hastings *v.* Pepper, 11 Pick. 41; Citizens' Bank *v.* Nantucket S. B. Co., 2 Story 16; Jencks *v.* Coleman, 2 Sumner, 221; McGregor *v.* Kilgore, 6 Ohio 358; 27 Am. Dec. 260; Bowman *v.* Hilton, 11 *id.* 303; McArthur *v.* Sears, 21 Wend. 190; Dunseth *v.* Wade, 2 Scam. 285; Hart *v.* Allen, 2 Watts 114; Harrington *v.* M'Shane, *id.* 443; 27 Am. Dec. 321; Warden *v.* Greer, 6 *id.* 424; Pardee *v.* Drew, 25 Wend. 459; Porterfield *v.* Humphreys, 8 Humph. 497; Kirtland *v.* Montgomery, 1 Swan 452; Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455; Cole *v.* Goodwin, *id.* 251; 32 Am. Dec. 470; Hale *v.* The N. J. Nav. Co., 15 Conn. 539; Jones *v.* Pitcher, 3 Stew. & P. 136; 24 Am. Dec. 716; Sprowl *v.* Kellar, 4 *id.* 382; Richards *v.* Hansen, 1 Fed. Rep. 54.

It has been laid down by some authorities that no ship is a common carrier that does not ply regularly on some definite route or between certain termini as a packet, and that a general ship is not a common carrier. Pars. on Shipping, p. 174. But in a modern English case the question was decided by the Exchequer Chamber the other way. Liver. Alkali Co. *v.* Johnson, L. R. 9 Ex. 338; 7 Ex. 267. The defendant was a barge owner and let out vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement and a barge was not let to more than one person. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure; and it was held, affirming the judgment of the Court of the Exchequer, that the defendant had incurred the liability of a common carrier and was liable though the goods were lost without any fault on his part.

3 Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455; Cole *v.* Goodwin, 19 Wend. 251; 32 Am. Dec. 470; Clark *v.* Faxton, 26 Wend. 153; Powell *v.* Myers, 26 Wend. 591; Camden, etc., Transp. Co. *v.* Belknap, 21 Wend. 354; Jones *v.* Voorhees, 10 Ohio 145; Dwight *v.* Brewster, 1 Pick. 50; 11 Am. Dec. 133; Bean *v.* Sturtevant, 8 N. H. 146; 28 Am. Dec. 389; Beckman *v.* Shouse, 5 Rawle, 179; 28 Am. Dec. 653; Powell *v.* Mills, 30 Miss. 231; 64 Am. Dec. 158; Walker *v.* Skipwith, Meigs. 502; 33 Am. Dec. 161; Pixotti *v.* McLaughlin, 1 Strobh. 468; 47 Am. Dec. 563; Henry *v.* R. Co., 4 Harr. (Del.) 448.

But the mere practice of the driver, unknown and unassented to by the proprietor, to carry parcels for a compensation will not render the latter liable. Dwight *v.* Brewster, 1 Pick. 50; 11 Am. Dec. 133; Blanchard *v.* Isaacs, 3 Barb. 388; Beckman *v.* Shouse, 5 Rawle, 179; 28 Am. Dec. 683; Bean *v.* Sturtevant, 8 N. H. 146; 28 Am. Dec. 389; Butler *v.* Basing, 2 C. & P. 613; Sheldon *v.* Robinson, 7 N. H. 157; 26 Am. Dec. 726.

rado, an irrigating company is a common carrier of water.[1]

§ 85. **Who are not Common Carriers.**—But the following are not common carriers, nor subject to their duties and responsibilities: Carriers of passengers;[2] sleeping car companies;[3] telegraph companies;[4] nor are warehousemen and wharfingers;[5] nor owners of steamboats employed in the business of towing;[6] nor log driving and booming companies;[7] nor one who keeps horses and carriages for hire;[8] nor one who contracts with the government to carry its goods for a certain term;[9] nor a contractor for carrying the mails.[10]

§ 86. **Carriers of Live Animals.**—As the transportation of living animals was unknown to the era of the formation of the common law, it has been much debated as to whether persons engaging in this business are common carriers or not. Mr. Justice Willes regarded the question as being probably one of words, it being much the same thing to say that carriers of animals are not common carriers, and to say that they are common carriers, with the modification that they

1 Wheeler *v.* North. Col. Irrigation Co., 10 Colo. 582; 3 Am. St. Rep. 603; 17 Pac. Rep. 487.

2 See Post § 216.

3 See Post § 324.

4 See Post § 317.

5 Hutch Carr. 62.

6 The Supreme Courts of Louisiana and North Carolina have decided that they are. Smith *v.* Pierce, 1 La. 349; Adams *v.* New Orleans Towboat Co., 11 La. 45; Bussey *v.* Miss. Val. Trans. Co., 24 La. Ann. 165; 13 Am. Rep. 120; Walston v. Myers, 5 Jones, 174. The Supreme Courts of California and New Jersey, while deciding the cases before them on other grounds, and waiving this question as unnecessary to the decision of the cases, have intimated similar views. White *v.* The Mary Ann, 6 Cal. 462; 65 Am. Dec. 523; Ashmore *v.* Penn. Steam Tow Co., 28 N. J. (Law) 180. The Supreme Courts of New York, Kentucky and Pennsylvania hold the opposite doctrine. Caton *v.* Rumney, 13 Wend. 387; Alexander *v.* Greene, 3 Hill, 9; Wells *v.* Steam Nav. Co., 2 N. Y. 204; Leonard *v.* Hendrickson, 18 Pa. St. 40; 55 Am. Dec. 587; Varble *v.* Bigley, 14 Bush. 698; 29 Am. Rep. 435; Brown *v.* Clegg, 63 Pa. St. 51; 3 Am. Rep. 522; Hays *v.* Millar, 77 Pa. St. 238; 18 Am. Rep. 445.

7 Mann *v.* White River etc. Co., 46 Mich. 68; 41 Am. Rep. 141; 8 N. W. Rep. 550.

8 Siegrist *v.* Arnot, 10 Mo. (App.) 197.

9 U. S. *v.* Power, 6 Mon. 271.

10 Central R. & Bank Co., *v.* Lampley, 76 Ala. 357; 52 Am. Rep. 334 (1884).

are not liable for any damage or loss growing out of the vices or propensities of the animals carried.[1] The question is, however, very important, since it affects that of the burden of proof; and because it follows that, if such carriers are not common carriers, they are not liable for any damage or loss not occasioned in some way by their own want of skill and care, though such damage or loss may not fall within any of the exceptions made by law to the liabilities of common carriers. In England, carriers of living animals are not considered as common carriers,[2] and this is the view taken in several of the States.[3] But in most of the States, carriers of living animals are held to be common carriers, and to be insurers to the same extent as if engaged in carrying general merchandise, subject to the exception of any loss or damage caused by the animals to themselves or to each other.[4]

[1] Great Western R. Co. *v.* Blower, 20 W. R. 776 (1872).

[2] McManus *v.* R. Co., 2 H. & N. 693; McManus *v.* R. Co., 4 H. & N. 328; Carr v. R. Co., 7 Exch. 712; Palmer *v.* R. Co., 4 M. & W. 749; Pardington *v.* R. Co., 38 Eng. Law & Eq. Rep. 432; Kendall *v.* London R. Co. L. R. 7 Ex. 373 (1872).

[3] *Kentucky*—Louisville etc. R. Co. *v.* Hedger, 9 Bush 645; 15 Am. Rep. 740; Hall *v.* Renfro, 3 Met. (Ky.) 51. *Louisiana*—Pitre *v.* Offutt, 21 La. Ann. 679; 99 Am. Dec. 749. *Michigan*—Lake Shore R. Co. *v.* Perkins, 25 Mich. 329; 12 Am. Rep. 275; Michigan etc. R. Co. *v.* McDonough, 21 Mich. 165; 4 Am. Rep. 466. *Tennessee*—Baker *v.* R. Co., 10 Lea 364.

[4] Kimball *v.* R. Co., 26 Vt. 247; 62 Am. Dec. 567; Agnew *v.* The Contra Costa, 27 Cal. 425; 87 Am. Dec. 87; Atchison etc. R. Co. *v.* Washburn, 5 Neb. 117; Kansas etc. R. Co. *v.* Reynolds, 8 Kas. 623; Kansas etc. R. Co. *v.* Nicholls, 9 Kas. 235; 12 Am. Rep. 494; Ritz *v.* R. Co., 3 Phila. 82; Cragin *v.* R. Co., 51 N. Y. 61; 10 Am. Rep. 559; Penn *v.* R. Co., 49 N. Y. 204; Mynard *v.* R. Co., 71 N. Y. 180; *s. c.*, 7 Hun, 399; 27 Am. Rep. 28; German *v.* R. Co., 38 Iowa 127; McCoy *v.* R. Co., 44 Iowa, 424; Wilson *v.* Hamilton, 4 Ohio St. 722; Welsh *v.* R. Co., 10 Ohio St. 65; St. Louis etc. R. Co. *v.* Dorman, 72 Ill. 504; South Alabama etc. R. Co. *v.* Henlein, 52 Ala. 606; 23 Am. Rep. 578; Rixford *v.* Smith, 52 N. H. 355; 13 Am. Rep. 42; Clarke *v.* R. Co., 14 N. Y. 750; 67 Am. Dec. 205; Ohio etc. R. Co. *v.* Dunbar, 20 Ill. 623; Smith *v.* R. Co., 12 Allen, 531; Evans *v.* R. Co., 111 Mass. 142; Conger *v.* R. Co., 6 Duer, 375; Harris *v.* R. Co., 20 N. Y. 232; Powell *v.* R. Co., 32 Pa. St. 414; East Tennessee etc. R. Co. *v.* Whittle, 27 Ga. 535; 73 Am. Dec. 741; Ayres *v.* R. R. Co., 71 Wis. 372; 5 Am. St. Rep. 226; 37 N. W. Rep. 432; Mason *v.* R. Co., 25 Mo. App. 473; Chicago etc. R. Co. *v.* Harmon, 12 Ill. App. 54; Mo. Pac. R. Co. *v.* Harris, 67 Tex. 166; 2 S. W. Rep. 574; Lindsley *v.* R. Co., 36 Minn. 539; 1 Am. St. Rep. 692; 33 N. W. Rep. 7; Gulf etc. R. Co. *v.* Trawick, 68 Tex. 314; 4 S. W. Rep. 567; 2 Am. St. Rep. 494; Bamberg *v.* R. Co., 9 S. C. 61; 30 Am. Rep. 13; Mich. Cent. R. Co. *v.* Myrick, 1

§ 87. **Divisions of the Subject.**—Having ascertained who is a common carrier, we shall consider the law relating thereto in four chapters, in the order in which his duties arise when he undertakes to prosecute his public calling, *i. e.:* I. The Duty to Receive Goods Tendered to Him (Chap. X.); II. His Responsibility While They are in His Possession (Chap. XI.); III. The Modification of that Duty by Agreement (Chap. XII.); IV. The Duty to Re-deliver the Goods (Chap. XIII.).

Sup. Ct. Rep. 425 (U. S. Sup. Ct.); Brown *v.* R. Co., 18 Mo. (App.) 569; St. Louis etc. R. Co. *v.* Lesser, 46 Ark. 236; Ill. Cent. R. Co. *v.* Brelsford, 13 Ill. (App.) 251; Chicago etc. R. Co. *v.* Harmon, 12 Ill. (App.) 54; Wabash etc. R. R. Co. *v.* McCasland, 11 Ill. (App.) 491; Ind. etc. R. Co. *v.* Jurey, 8 Ill. (App.) 160; Chicago etc. R. Co. *v.* Owen, 21 Ill. (App.) 339; Kinnick *v.* R. Co., 69 Iowa 668; 29 N. W. Rep. 772; Baker *v.* R. Co., 10 Lea, 304; Porterfield *v.* Humphreys, 8 Humph. 497.

CHAPTER X.

THE DUTY TO RECEIVE.

SECTION 88. Common Carrier Subject to Legislative Control and Regulation.
89. Must Carry for all Persons.
90. Must Carry for Reasonable Compensation.
91. Must Carry for all under same Conditions.
92. Discrimination in Charges.
93. Exceptions to Rule that Common Carrier must Carry for all.
94. Where Payment of Charges Refused.
95. Where Service Demanded Outside his Profession.
96. Where Goods Illconditioned or Suspicious.
97. Where he has Insufficient Room.
98. Carriage must be for Hire.
99. Carriage beyond Carrier's Route.
100. Carrier's Power to Carry Beyond his Route.
101. Not Bound to do so.
102. Effect of Agreement Not to Carry Beyond Route.
103. Proof of Agreement to Carry Beyond Route.
104. Actual Delivery to Connecting Carrier Required.
105. Aliter as Between the Carriers Themselves.
106. Receipt of Goods marked to Place Beyond Route.—The English Rule.
107. The American Rule.
108. Right of Connecting Carriers to Exemptions in First Contract.
109. Power of First Carrier to Contract with Connecting Carriers.
110. Other Rights and Liabilities of Connecting Carriers.
111. Presumption as to Time of Damage.

§ 88. **Common Carrier Subject to Legislative Control and Regulation.**—The duties of the common carrier are public duties, and he is subject to public regulation and control.[1] The State has power to forbid

1 Peck *v.* R. R. Co., 94 U. S. 164; Chicago etc. R. Co. *v.* Ackley, 94 U. S. 179; Winona etc. R. Co. *v.* Blake, 94 U. S. 180; Thurman *v.* Wells, 18 Barb. 500.

discriminations in the carriage of goods or passengers;[1] and to regulate the carrier's charges, provided that such regulations do not impair any contract right which the carrier has acquired by his charter,[2] and provided that under the pretense of regulation the State does not require the carrier to carry persons or property without reward, or at such a rate as to make the carrying business a losing, instead of a reasonably profitable calling.[3] The State legislature (as to the carrier's business from place to place within the limits of the State), the Federal Congress (as to interstate carriage), may regulate the charges of common carriers, either by a statute prescribing the legal charges, or through a commission created by it.[4] The right, however, of the courts to inquire into the reasonableness of the rates established by the legislature or its agents, cannot be taken away by the State or Government.[5]

The State or Government may also, under its police power, for the protection of the life, limb and property of the citizen and the welfare of the public, regulate the mode of conducting the business of the carrier, and

1 Chicago etc. R. Co. *v.* People, 67 Ill. 11; 16 Am. Rep. 597; De Cuir *v.* Benson, 27 La. Am. 1.

2 Cooley Const. L. 311.

3 Stone *v.* Farmers' etc. Co., 116 U. S. 307; 6 S. C. Rep. 334, 1191. "To take an extreme case, if the interests of the carrier and shipper in respect to rates are irreconcilable, that is, if the highest rate which the shipper can afford to pay will not recompense the carrier for cost of service, the carrier clearly could not be compelled to carry, for that would be taking private property for private uses, or at any rate for public uses, without just compensation, as well as an infraction of certain other constitutional provisions. So that the carrier is at least entitled to charge a rate which will pay the cost of service. This proposition would seem to be elementary under the constitutional guarantees of our form of government. But it is necessary to allude to it on account of the feeling that exists in some sections of the country that railroads are, or should be, compelled to carry at such a rate as will enable the shipper to prosper though it ruin the carrier. The power to regulate does not mean the power to destroy." Alb. L. J. vol. 48 p. 52.

4 Chicago etc. R. Co. *v.* Minnesota, 134 U. S. 418; 10 S. C. Rep. 462, 702. At least half of the States have established commissions of this kind. See 2 Stim. Am. St. L. § 8570.

5 Chicago etc. R. Co. *v.* Minnesota, *supra.*

against such power, the carrier's previous contract rights under his charter, are of no avail, as it is well settled that the right of the legislature to exercise its police power, cannot be alienated, surrendered or abridged by any grant, contract or delegation by any former legislature.[1] Nevertheless, whether or not the exercise of the power in the particular case is proper, is subject to the examination and decision of the courts.[2]

§ 89. **Must Carry for all Persons.**—A common carrier is bound to carry. A man is free from any duty to carry another man's goods until he has entered into a special agreement to do so, but a common carrier, by the very fact of holding himself out as such, has on his side made an offer to all the public to carry their goods, which becomes at once a complete and binding contract when any person brings him his goods, and makes the request that he shall carry them to a certain other person or place.[3] For a refusal to carry, he is liable to an action at law, at the suit of the person whose goods have been refused;[4] and he may like-

1 Lawson Rights, Rem. & Pr. § 3907; People *v.* Squire, 107 N. Y. 593; 14 N. E. Rep. 820; Railroad Co. *v.* Fuller, 17 Wall. 560; State *v.* R. Co., 32 Fed. Rep. 722; Nashville etc. R. Co. *v.* State, 83 Ala. 71; 3 South. Rep. 702; 128 U. S. 96; 9 S. C. Rep. 28; Fitchburg etc. R. Co. *v.* R. Co. 1 Allen 552; Pitts. etc. R. Co. v. Brown, 67 Ind. 45; 33 Am. Rep. 73.

2 *Id.* People *v.* Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465; 17 N. E. Rep. 343.

3 Browne Carr. § 40; Moses *v.* R. Co., 24 N. H. 71; McDuffee *v.* R. Co., 52 N. H. 430; 13 Am. Rep. 72; Peoria etc. R. Co. *v.* R. Co., 109 Ill. 135; 50 Am. Rep. 605; Chicago & R. Co. *v.* R. Co., 34 Fed. Rep. 481; Chicago etc. R. Co. *v.* Erickson, 91 Ill. 613; 33 Am. Rep. 70. The statement of the superintendent of a railroad that they would carry no more coal for the plaintiff does not, in the absence of an actual tender of coal for carriage, amount to a refusal to carry so as to make the carrier liable to an action. Wilder *v.* R. Co., 30 Atl. Rep. 41 (Vt.)

4 Story on Bailments, § 508; Doty *v.* Strong, 1 Pinn. 313; 40 Am. Dec. 773; Maybin *v.* R. Co., 8 Rich. 240; 64 Am. Dec. 753; Wheeler *v.* R. Co., 31 Cal. 46; 89 Am. Dec. 147; Ayres *v.* R. Co., 71 Wis. 372; 37 N. W. Rep. 432. Where the carrier refuses out of ill will or through a willful disregard of the person's rights exemplary damages may be given. Avinger *v.* R. Co , 7 S. E. Rep. 493 (S. C.)

wise be proceeded against by the extraordinary writs of injunction and mandamus.[1]

§ 90. **Must Carry for a Reasonable Compensation.** — Although as we shall see,[2] a carrier is permitted to grade his charges according to the value of the goods and the risk he runs, he is not at liberty to charge whatever he pleases. His charges must be reasonable, and anything like extortion on his part will be promptly checked by the courts,[3] either by an injunction or by actions to recover back the unreasonable charges.[4]

§ 91. **Must Carry for all under the Same Conditions.** — He must carry for all alike, and cannot extend facilities and accommodations to one man and refuse them to another,[5] for it is clear that the denial of the entire right of service by a refusal to carry, dif-

[1] McDuffee *v.* R. Co., 52 N. H. 430; 13 Am. Rep. 72, the Court saying: "There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual on account of the difficulty of proving large damages, or the incompetence of a multiplicity of such suits to abate a continued grievance, or for other reasons. In such cases there would be a plain and adequate remedy, where there ought to be one, by the re-enforcing operation of an injunction, or by indictment, information, or other common, familiar and appropriate course of law." State *v.* R. Co., 48 N. J. (L.) 55; 57 Am. Rep. 543; People *v.* R. Co., 28 Hun. 543; Chicago etc. R. Co. *v.* People, 56 Ill. 365; 8 Am. Rep. 690; People *v.* R. Co., 55 Ill. 95; 8 Am. Rep. 631; Sanford *v.* R. Co., 24 Pa. St. 378; 64 Am. Dec. 667; Menacho *v.* Ward, 27 Fed. Rep. 529. At common law a common carrier may be indicted for breach of his common law duty on the same principle that an innkeeper may be indicted for refusing to receive a guest. Pozzi *v.* Shipton, 1 P. & D. 12; R. *v.* Ivens, 7 C. & P. 213; 4 Black. Com. 167.

[2] Post § 142.

[3] Harris *v.* Packwood, 3 Taunt. 264; Wallace *v.* Matthews, 39 Ga. 617; Holford *v.* Adams, 2 Duer 471; Three Hundred and Eighteen Tons of Coal, 14 Blatchf. 453; Chamblis *v.* R. Co., 4 Brewst. 563.

[4] Menacho *v.* Ward, 27 Fed. Rep. 529; Peters *v.* R. Co., 42 Ohio St. 275; 51 Am. Rep. 814; Cook *v.* R. Co., 46 N. W. Rep. 1080 (Ia.)

[5] McDuffee *v.* R. Co., 52 N. H. 430; 13 Am. Rep. 72; New England Ex. Co. *v.* R. Co., 57 Me. 188; 2 Am. Rep. 31; Sanford *v.* R. Co., 24 Pa. St. 378; 64 Am. Dec. 667; Messenger *v.* R. Co., 36 N. J. L. 407; 13 Am. Rep. 457; 37 N. J. L. 531; 18 Am. Rep. 755; Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 230; Michigan etc. R. Co. *v.* McDonough, 21 Mich. 165; 4 Am. Rep. 466.

fers in degree only, and not in the essential legal character of the act, from the denial of the right in part by an unreasonable discrimination in facilities, or accommodations. He is not allowed to show favors, or make distinctions which will give one employer an advantage over another "either in the time or order of shipment, or in the distance of the carriage, or in the conveniences or accommodations which may be afforded."[1] A railroad must not delay or stop the transportation of the property of one shipper in order to give that of another a preference.[2]

§ 92. **Discrimination in Charges.**—But in the matter of his charge for the service, the common law did not require the carrier to treat every man with absolute equality. He could charge A less than a fair compensation, or carry for A free of charge, provided he did not charge B more than a fair compensation. This was certainly the English rule prior to the passage of a statute prohibiting discrimination in rates by railroad and canal companies.[3] And the same view of the common law is taken by the American Courts and text writers.[4] A reasonable price paid by B is not

1 Hutch. Carr. § 297.

2 Keeney *v.* R. Co., 59 Barb. 104; Great West. R. Co. *v.* Burns, 60 Ill. 284; Galena etc. R. Co. *v.* Rae, 18 Ill. 488; 68 Am. Dec. 574; Dixon *v.* R. Co., 64 Ia. 531; 52 Am. Rep. 469; 21 N. W. Rep. 17; Frazier *v.* R. Co., 48 Ia. 571.

3 17 and 18 Vic. c 31 (1845). The English writers and judges uniformly declare that the object of this statute was to put an end to the practice of discrimination in rates then indulged in without restraint. See Browne Carr. § 307. In Baxendale *v.* R. Co., 4 C. B. (N. S.) 76, Byles, J., said: "I know no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry him free of all charge." In Great West. R. Co. *v.* Sutton, 38 L. J. (Ex.) 184; L. R. 4 H. L. 238, Blackburn, J., said: "There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable."

4 Menacho *v.* Ward, 27 Fed. Rep. 529; Johnson *v.* R. Co. 16 Fla. 623; 26 Am. Rep. 731; Ragan *v.* Aiken, 9 Lea. 609; 42 Am. Rep. 684; Fitchburg R. Co. *v.* Sage, 12 Gray 393; Cowden *v.* Pacific Coast S. S. Co. 29 Pac. Rep. 873 (Cal.); *ex parte* Benson, 18 S. C. 38; 44 Am. Rep. 564; see Story Bail. § 508, *note;* Wood Ry. Law § 197. In some States it has been

made unreasonable by a less price being paid by A. As put by Crompton, J., in an English case, "The charging another party too little is not charging you too much."[1] Whether the carrier charges another more or less than the price charged a particular individual, may, however, be a matter of evidence in determining whether a charge is too much or too little for the service performed, and is or is not reasonable.[2] And where the discrimination is made to the obvious detriment of the shipper or the public,[3] then it is not reasonable, and even at common law, it is unlawful.

wrongly assumed in passing on statutes forbidding unjust discrimination by common carriers that these statutes are only declaratory of the common law. Messenger *v.* R. Co. 36 N. J. (L.) 407; 13 Am. Rep.; Schofield *v.* R. Co. 43 Ohio St. 371; 54 Am. Rep. 846.

1 Garten *v.* R. Co., 1 B. & S. 112.

2 Johnson *v.* R. Co. *supra;* Menacho *v.* Ward, *supra;* Kelly *v.* R. Co., 61 N.W. Rep. 959 (Ia). "I think it appears from the preamble of the 90th section of the Railways Clauses Consolidation Act (1845) that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And, if this be borne in mind, I think the construction of the proviso for equality is clear, and is that the defendants may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies, acting as carriers, on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable. The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statuable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances." Blackburn, J. in Great West. R. Co. *v.* Sutton, L. R. 4, H. L. 238.

3 Hays *v.* R. Co., 12 Fed. Rep. 309; St. Louis etc. R. Co. *v.* Hill, 4 Ill. (App.) 579; Ragan *v.* Aiken, *supra;* Houston etc. R. Co. *v.* Rust, 58 Tex. 98; Hersh *v.* R. Co., 74 Pa. St. 181; Chicago etc. R. Co. *v.* People, 67 Ill. 11; Burlington etc. R. Co. *v.* Fuel Co., 31 Fed. Rep. 652; Concord etc. R. Co. *v.* Forsaith, 59 N. H. 122; 47 Am. Rep. 181; Shipper *v.* R. Co., 47 Pa. St. 338; Samuels *v.* R. Co., 31 Fed. Rep. 57.

Thus in *Menacho* v. *Ward*[1] a carrier by water between New York and Cuba charged the plaintiff a higher rate of freight for transporting goods than he charged other shippers, because the plaintiff would not agree to employ that line exclusively. It was held, that the discrimination was unlawful, and would be enjoined. "The obligation of a carrier," said Wallace, J., "is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. * * * The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba, from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated, it will result practically in giving the defendants a monopoly of the carrying trade between those places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between those places. Such discrimination is not only unreasonable, but it is odious." So in Ohio a discrimination was ruled to be illegal where its tendency was to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.[2]

Fully one-half of the States, as well as the Federal Government in the Inter-State Commerce act, have followed the English legislation requiring equality of rates, and the common law rules on this subject are greatly modified by these statutes.[3]

1 27 Fed. Rep. 529.
2 State *v.* R. Co., 23 N. E. Rep. 928.
3 For the provisions of the statutes see Stim. Am. St. L., Art. 833.

§ 93. **Exceptions to Rule that Common Carrier Must Carry for All.**—The general rule laid down in section 89, that the carrier must carry for all, is necessarily subject to a number of exceptions, for it will be found that he is *not* bound to carry in the following four cases:

§ 94. **Where Payment of Charges are Refused.**—The common carrier of goods has a right to demand payment for his services in advance, and may refuse to carry property placed in his hands until his charges are paid.[1] It is not necessary that a specific sum of money should be promised or agreed upon; but where that is not the case, there is an implied undertaking upon the part of the carrier that his charges shall be reasonable.[2] In omitting to demand the charges in advance, a carrier becomes bound to transport according to his custom.[3] Where a carrier, after informing the owner of goods delivered to him for transportation that they will be held at the place of receipt until the freight charges are prepaid, ships the goods without payment, and without notice to the owner, he is liable for damages resulting from such premature shipment.[4]

§ 95. **Where Service Demanded Outside His Profession.**—As it is allowable for a carrier to go into the business of carrying one kind of goods and not an-

1 Fitch *v.* Newberry, 1 Doug. 1; 40 Am. Dec. 33; Stewart *v.* Bremer, 63 Pa. St. 268.

2 Citizens' Bk. *v.* Nantucket Steam. Co., 2 Story, 16.

3 Galena etc. R. Co. *v.* Rae, 18 Ill. 488; 68 A. D. 574. In an action against the carrier for refusing to carry, a tender of the money for the freight need not be averred; a readiness to pay is sufficient. Bastard *v.* Bastard, 2 Show. 81; Pickford *v.* R. Co., 8 M. & W. 372, Baron Parke saying that, "whenever a duty is cast upon a party in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay or be ready to pay the money when the other is ready to undertake the duty. The money is not required to be paid down until the carrier receives the goods which he is bound to carry."

4 Campion *v.* R. Co. 43 Fed. Rep. 775.

other, or to one place and not to all places, he may refuse to carry goods of a different kind from those which he professes to carry, and he may refuse to carry to a different place than that to which he is accustomed to carry.[1] Thus, one holding himself out as a carrier of small parcels from A to B, may refuse to carry a large boiler, a quantity of pig iron, or the like, from A to B, or a small parcel from A to C.[2] A clause in the charter of a railroad, requiring it to transport "merchandise and other property," does not oblige it to become a common carrier of money.[3] The representations which the carrier has made to the public are the proper guide to decide as to the scope and nature of his business. He must receive such goods as his charter requires him, or as he has held himself out as ready to receive,[4] either by express statements, or by his former course of dealing.[5] In the case of ships, steamboats, railroads and other well-known classes of carriers, the courts will take judicial notice of the fact that they are common carriers of certain large classes of goods, and no proof of this fact will be required.[6] If, being carriers within a State, they are bound to take the goods offered to them to be carried within the State, it follows,

1 Pitlock *v.* Wells, 109 Mass. 452.

2 Pitlock *v.* Wells, 109 Mass. 452.

3 Kuter *v.* R. Co., 1 Biss. 35; Sewall *v.* Allen, 6 Wend. 346; Citizens Bk. *v.* Nantucket S. B. Co., 2 Story 33.

4 Knox v. Rives, 14 Ala. 249; 48 Am. Dec. 97; Powell *v.* Mills, 30 Miss. 231; 64 Am. Dec. 158; Tunnell *v.* Pettijohn, 2 Harr. (Del.) 48; Lake Shore etc. R. R. Co. *v.* Perkins, 25 Mich. 329; 12 Am. Rep. 275.

5 By usage a carrier may be held liable as a carrier of money. Kemp *v.* Coughtry, 11 Johns. 109; Cincinnati etc. Mail Co. *v.* Boal, 15 Ind. 345; Sheldon *v.* Robinson, 7 N. H. 157; Emery *v.* Hersey, 4 Greenl. 407; 16 Am. Dec. 268; Harrington *v.* McShane, 2 Watts, 443; 27 Am. Dec. 321; Merwin *v.* Butler, 17 Conn. 138; Hosea *v.* McCrory, 12 Ala. 349; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Dwight *v.* Brewster, 1 Pick. 50; 11 Am. Dec. 133; Allen *v.* Sewall, 2 Wend. 317; Sewall *v.* Allen, 6 Wend. 335; Van Santvoord *v.* St. John, 6 Hill, 158; Kirtland *v.* Montgomery, 1 Swan, 452. Or of cash letters. Hosea *v.* McCrary, 12 Ala. 347. Or as an agent to sell, and return the proceeds. Lawson Usages and Customs. § 78.

6 Hutch. Carr., § 73; Browne Carr., § 57.

that if they profess to be carriers beyond the State, being themselves, at the time they so profess, within the State, they are bound to accept and to carry goods beyond the State upon the terms on which they profess to contract.[1]

He may refuse to carry goods tendered to him at a place not his usual business place, or outside his business hours.[2]

§ 96. **Where Goods Ill-Conditioned or Suspicious.** — He may refuse property not properly packed.[3] An express company is not bound to receive money for transportation unless it is properly secured and addressed.[4] But a shipper delivering goods to a carrier is not required to cover them so as to protect them from rain, wind, or fire.[5] So, he may refuse suspicious packages whose contents the shipper refuses to dis-

1 Crouch *v.* R. Co., 23 L. J. C. P. 73; see *post*, Connecting Carriers.

2 Pickford *v.* R. Co., 12 Mees. & W. 776; Cronkite *v.* Wells, 32 N. Y. 247; Louisville etc. R. Co. *v.* Flanagan, 113 Ind. 488; 14 N. E. Rep. 370. In a Pennsylvania case plaintiff was accustomed to ship coal by defendants' railroad for transportation beyond their line upon the Delaware River. Defendants had also allowed plaintiff, for a certain consideration, to use their wharf at the river terminus of the railroad; but subsequently, there not being room for all the shippers, they denied plaintiff the wharf facilities, while they allowed others to use the wharf. It was held, that although transportation by defendants, common carriers, was necessarily open to the public without discrimination, yet wharfage was within the discretion of defendants, and a mandatory injunction would not lie compelling them to allow wharfage facilities to plaintiff as well as others: Audenried *v.* R. R. Co., 68 Pa. St. 370; 8 Am. Rep. 195. It has been held in Maine, New Hampshire and Pennsylvania that a railroad cannot give to one express company certain privileges and extra facilities for conducting its business, and refuse them to another company. New England Ex. Co. *v.* R. Co., 57 Me. 188; 2 Am. Rep. 188; McDuffee *v.* R. Co., *supra;* Sanford *v.* R. Co., 24 Pa. St. 378; 64 Am. Dec. 667. But the Supreme Court of the United States subsequently decreed that an express company has no right to ask the special privileges without which the express business cannot be carried on, and if it gets them it must be by a special contract, which the carrier may make with one and refuse to make with another. Memphis etc. R. Co. *v.* South. Ex. Co., 117 U. S. 1; 6 S. C. Rep. 542, 628.

3 Union Ex. Co. *v.* Graham, 26 Ohio St. 195; Vicksburg Co. *v.* U. S. Ex. Co., 8 South. Rep. 332.

4 Fitzgerald *v.* Adams Ex. Co., 24 Ind. 447; 87 Am. Dec. 341. He is not bound to count the money in a package tendered, and his refusal raises no presumption against him: *Id.*

5 Klauber *v.* Am. Ex. Co., 21 Wis. 21; 91 Am. Dec. 452.

close,[1] or goods which are exposed to destruction by a mob or other outbreak.[2]

§ 97. **Where He has Insufficient Room.**—He is not to be compelled to carry goods, if the vehicle which he ordinarily employs for the transportation of goods is not able to contain the article which is offered. The ordinary carrier is under no duty to provide extra carts or wagons to satisfy the extra demands that may be made on them.[3] But in the case of the railroads of the country chartered and given special privileges by the State, not only the statutes of many of the States,[4] but the common law,[5] require them to furnish sufficient accommodation for such property as may be offered to them for transportation. By this is not meant that the railroad must have at all times and at all places where goods may be tendered to it, cars enough to transport them. It means that it shall provide facilities for the amount of goods it has reasonable grounds for believing will be offered at the particular time or place, but shall not be liable for failing to anticipate or provide for an extraordinary or unusual influx of freight.[6]

§ 98. **Carriage Must be for Hire.**—To render one liable as a common carrier, it is essential that the carriage shall be for hire and not gratuitous.[7] "I take

1 Dinsmore *v.* R. Co., 3 Fed. Rep. 593; Nitro-glycerine Case, 15 Wall. 524; Riley *v.* Home, 5 Bing. 217; Brass *v.* R. Co., 6 El. & B. 485; Crouch *v.* R. Co., 14 Com. B. 291.

2 Edwards *v.* Sheffat, 1 East 604; Hutchinson on Carriers, § 115; Story on Bailments, § 508; Porcher *v.* R. R. Co., 14 Rich. 181. And see Pearson *v.* Duane, 4 Wall. 605.

3 See Riley *v.* Home, 5 Bing. 217; Lovett *v.* Hobbs, Shaw 217.

4 See Ballentine *v.* R. Co., *post.*

5 Galena etc. R. Co. *v.* Rae, 18 Ill. 488; 68 Am. Dec. 574.

6 Peet *v.* R. Co., 20 Wis. 594; Galena etc. R. Co. *v.* Rae, 18 Ill. 488; 68 Am. Dec. 574; Faulkner *v.* R. Co., 51 Mo. 311; Ballentine *v.* R. Co., 40 Mo. 491; 93 Am. Dec. 315.

7 Citizens' Bk. *v.* Nantucket Steamboat Co., 2 Story 16; Self *v.* Dunn, 42 Ga. 528; 5 Am. Rep. 544; Littlejohn *v.* Jones, 2 McMull. 366; 39 Am. Dec. 132.

it to be exceeding clear," says Mr. Justice Story,[1] "that no person is a common carrier in the sense of the law, who is not a carrier for hire, that is, who does not receive, or is not entitled to receive any recompense for his services. The known definition of a common carrier in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justiciæ*, but something is bestowed as a gratuity or voluntary gift, then, although the party may transport either persons or property, he is not, in the sense of the law, a common carrier, but he is a mere mandatory or gratuitous bailee, and of course his rights, duties and liabilities are of a very different nature and character from those of a common carrier."[2] But as in the case of bailments generally, the consideration need not be direct.[3] Thus, where corn was shipped by a railroad company which agreed to return the empty bags free,[4] where empty coal oil tanks were returned free,[5] and where a carrier undertook to transport goods and sell them, and bring the money arising from the sale back with him without charge,[6] it was held that neither the carriage of the empty bags, or tanks, nor the return of the money could be considered as gratuitous.

§ 99. **Carriage Beyond Carrier's Route.**—In the transportation of goods even to points not far distant it is not always possible to have the duty performed by only one carrier. The first carrier is frequently able to perform the service but in part, and is forced to rely upon others in the same business, and whose lines extend beyond his own, to complete the carriage which he has commenced. The carrier's line, we will say, ex-

1 Citizens' Bk. *v.* Nantucket Steamboat Co., 2 Story, 416.

2 See *ante* § 83. Gratuitous Bailments.

3 See *ante* § 82.

4 Pierce *v.* R. R. Co., 23 Wis. 387.

5 Spears *v.* R. Co., 67 Barb. 513.

6 Harrington *v.* McShane, 2 Watts, 443; 27 Am. Dec. 321.

tends from A to B. At B another road begins which extends to C. A shipper at A desires to have goods sent to C, and delivers them to the carrier, whose line commences at A, for that purpose. It is obvious that the latter in entering into this contract may incur two liabilities at his option, viz., (a) he may bind himself to carry the goods to C, employing the second carrier to perform the service from B to C as his agent, or (b) he may simply undertake to carry the goods to B, and then, as the agent of the shipper, deliver them to the second carrier to take them to C.

§ 100. **Carrier's Power to Carry Beyond His Route.**—A common carrier may agree to carry goods and deliver them at a place beyond his own route, and such an agreement is not *ultra vires*.[1] The effect of this agreement is to make him responsible until delivery of the goods is made at their destination, and the connecting carriers become his agents for whose neglect or other defaults he is responsible, which liability cannot be gotten rid of by any stipulation that his responsibility is to terminate at the end of his own route.[2]

1 Redfield on Carriers, secs. 190-197; Green's Brice on Ultra Vires, app. iii. 673; Hill Mfg. Co. *v.* R. Co., 104 Mass. 122; 6 Am. Rep. 262; Wheeler *v.* R. Co., 31 Cal. 46; 89 Am. Dec. 147; Helliwill *v.* R. Co., 7 Fed. Rep. 68; Freeburg etc. Coal Co. *v.* R. Co., 10 Mo. (App.) 597; Swift *v.* Pacific Mail S. S. Co., 106 N. Y. 201; 12 N. E. Rep. 583; Carey *v.* R. Co., 29 Barb. 35; Candee *v.* R. Co., 21 Wis. 582; 94 Am. Dec. 566; Nashville etc. R. Co. *v.* Sprayberry, 9 Heisk. 852. In a New York case it is said that the plea of *ultra vires*, according to its just meaning, imports, not that the corporation could not, and did not in fact, make the unauthorized contract, but that it ought not to have made it. Such a defence, therefore, necessarily rests upon the violation of trust or duty toward the shareholders, and is not to be entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea. Bissell *v.* R. Co., 22 N. Y. 258.

2 Cincinnati etc. R. Co. *v.* Pontius, 19 Ohio St. 221; 2 Am. Rep. 391; Condict *v.* R. Co., 54 N. Y. 500; Toledo etc. R. Co. *v.* Lockhart, 71 Ill. 627; Gulf etc. R. Co. *v.* Wilbanks, 27 S. W. Rep. 302 (Tex.); Gulf etc. R. Co. *v.* Wilson, 26 S. W. Rep. 131 (Tex.); Pereira *v.* R. Co., 66 Cal. 92; 4 Pac. Rep. 92; Bussey *v.* R. Co., 4 McCrary 405; Dunn *v.* R. Co., 68 Mo. 268; Little *v.* Semple, 8 Mo. 99; 40 Am. Dec. 123; Washington *v.* R.

§ 101. **Not Bound to Do so.**—The law does not compel the carrier to do business beyond his own lines of transportation,[1] and hence, he may stipulate that he shall not be liable for any loss or damage except such as may occur on his own route—in other words, he may undertake simply to deliver the goods to the connecting carrier—in which event his liability will cease with such delivery, he having done all that either the law or his agreement requires him to do.[2] A stipulation in

Co., 101 N. C. 239; Maskos *v.* Am. S. S. Co., 15 Phila. 488; Texas etc. R. Co. *v.* Scrivener, 2 Tex. App. Case 318; Gulf etc. R. Co. *v.* Golding, 23 A. & E. R. R. Co. 732; Perkins *v.* R. Co., 47 Me. 578; 74 Am. Dec. 507; Jennings *v.* R. Co., 5 N. Y. (Supt.) 140; Merchants' etc. Trans. Co. *v.* Bloch, 86 Tenn. 372; 6 Am. St. Rep. 847; Galveston etc. R. Co. *v.* Allison, 57 Tex. 193; Kyle *v.* R. Co., 10 Rich. 382; 70 Am. Dec. 231; Southwestern R. Co. *v.* Thornton, 71 Ga. 61.

1 Pitts. etc. R. Co. *v.* Morton, 61 Ind. 539; 28 Am. Rep. 682; Lotsperch *v.* R. Co., 73 Ala. 306.

2 Railroad Co. *v.* Androscoggin Mills, 22 Wall 594; Railroad Co. *v.* Pratt, 22 Wall. 123; Mulligan *v.* R. Co., 36 Iowa, 180; 14 Am Rep. 514; Babcock *v.* R. Co., 49 N. Y. 491; 43 How. Pr. 317; Ætna Ins. Co. *v.* Wheeler, 43 How. Pr. 616; American Express Co. *v.* Second National Bank, 69 Pa. St. 394; 8 Am. Rep. 268; Reed *v.* United States Ex. Co., 48 N. Y. 462; 8 Am. Rep. 561; Lamb *v.* R. Co., 46 N. Y. 271; 7 Am. Rep. 327; Hall *v.* R. Co., L. R. 10 Q. B. 437; Ill. Cent. R. R. Co. *v.* Frankenberg, 54 Ill. 88; 5 Am. Rep. 92; Cincinnati etc. R. Co. *v.* Pontius, 19 Ohio St. 221; 2 Am. Rep. 391; Burroughs *v.* R. Co., 100 Mass. 26; 1 Am. Rep. 78; Honkley *v.* R. Co., 3 Thomp. & C. 281; St. Louis etc. R. Co. *v.* Piper, 13 Kan. 505; Aldridge *v.* R. Co., 15 Com. B., N. S., 582; Fowles *v.* R. R. Co., 7 Exch. 699; Kent *v.* R. Co., L. R. 10 Q. B. 1; Martin *v.* American Express Co., 19 Wis. 336; Oakey *v.* Gordon, 7 La. Ann. 235; Sullivan *v.* Thompson, 99 Mass. 259; Witbeck *v.* Holland, 55 Barb. 443; Pendergast *v.* Adams Express Co., 101 Mass. 120; Pemberton Co *v.* R. Co., 104 Mass. 144; Wahl *v.* Holt, 26 Wis. 703; Moriarty *v.* Harnden's Express, 1 Daly, 227; United States Express Co. *v.* Rush, 24 Ind. 403; Chicago etc. R. Co. *v.* Montford, 60 Ill. 175; Maghee *v.* R. Co., 45 N. Y. 514; 6 Am. Rep. 124; St. John *v.* Express Co., 1 Woods 615; Ricketts *v.* R. Co., 4 Lans. 446; 61 Barb. 18; Camden etc. R. Co. *v.* Forsyth, 61 Pa. St. 81; Pennsylvania R. Co. *v.* Schwarzenberger, 45 Pa. St. 208; 84 Am. Dec. 490; Farmers' etc. Bank *v.* Champlain Trans. Co., 23 Vt. 186; 56 Am. Dec. 68; Taylor *v.* R. Co., 32 Ark. 393; 29 Am. Rep. 1; United States Express Co. *v.* Haines, 67 Ill. 137; Erie R. Co. *v.* Wilcox, 84 Ill. 239; 25 Am. Rep. 451; Gibson *v.* American Express Co., 1 Hun. 387; Phifer *v.* R. Co., 89 N. C. 311; 45 Am. Rep. 687; East Tenn. R. Co. *v.* Brumley, 5 Lea, 401; Chicago etc. R. Co. *v.* Church, 12 Ill. App. 17; Piedmont Mfg. Co. *v.* R. Co., 19 S. C. 353; Berg *v.* R. Co., 30 Kan. 561; Goldsmith *v.* R. Co., 12 Mo. App. 479; Hadd *v.* U. S. Ex. Co., 52 Vt. 335; 36 Am. Rep. 75; Ala. etc. R. Co. *v.* Thomas, 3 South. Rep. 802; Ill. Cent. R. Co. *v.* Joute, 13 Ill. (App.) 425; Atchison etc. R. Co. *v.* Denver etc. R. Co., 4 U. S. S. C. Rep. 185; Harding *v.* International Nav. Co., 12 Fed. Rep. 168; Central R. Co. *v.* Avant, 5 S. E. Rep. 78 (Ga.); Pittsburg etc. R. Co. *v.* Morton, 61 Ind. 539; 28 Am. Rep. 682; Taylor *v.* R. Co., 32 Ark. 383; 29 Am. Rep. 1; Bussey *v.* R. Co., 4 McCrary, 405; Harding *v.* Int. etc. Nav. Co., 15 Phila. 434; Knott *v.* R. Co., 98 N. C. 735; Rickerson etc. Co. *v.* R. Co., 67 Mich. 110; McConnell *v.* R. Co., 9 S. E. Rep. 1006; Schiff *v.* R. Co., 16 Hun. 278; 81 N. Y. 38; St. Louis etc. R. Co. *v.* Larned, 103 Ill. 293; Cummins *v.* R. Co., 9 A. & E. R. R. Cas., 36; Cobb *v.* R.

a bill of lading by one of a line of carriers that the company in whose possession the goods are at time of loss or damage shall alone be liable, is a reasonable one.[1] So is a condition that the liability of the carrier accepting the goods shall cease on their delivery to the connecting carrier.[2]

§ 102. **Effect of Agreement Not to Carry Beyond Route.** —The effect of this agreement is to make the first carrier the agent of the shipper to make delivery to the connecting carrier, with power to bind him by such contracts as he makes in the execution of his agency.[3] And the shipper is responsible to connecting carriers for his mistakes.[4] Thus, where the last car-

Co., 38 Iowa, 601; O'Rourke *v.* R. Co., 44 Iowa, 526; Atchison etc. R. Co. *v.* Roach, 35 Kas. 740; Gulf etc. R. Co. *v.* Baird, 12 S. W. Rep. 530; New York etc. Steam Co. *v.* Wright, 26 S. W. Rep. 106 (Tex.).

1 Phifer *v.* R. Co., 89 N. C. 311; *s. c.* 45 Am. Rep. 687; Weinberg *v.* R. Co., 91 N. C. 31 (1884); Schiff *v.* R. Co., 52 How. Pr. 91; Hadd *v.* U. S. Ex. Co., 52 Vt. 335; 36 Am. Rep. 757.

2 Texas R. Co. *v.* Rogers, 3 S. W. Rep. 660 (1887) Tenn. Such a contract will be presumed from the fact that a clause thus limiting the liability appears in the bill of lading, although the shipper's attention was not called to it, it appearing that he had previously shipped similar articles and taken similar bills of lading. East Tenn. etc. R. Co. *v.* Brumley, 5 Lea 401; Wabash etc. R. Co. *v.* Jaggerman, 115 Ill. 407; 4 N. E. Rep. 641.

3 Briggs *v.* R. Co., 6 Allen, 246; 83 Am. Dec. 626; Squire *v.* R. Co., 98 Mass., 240; Rawson *v.* Holland, 59 N. Y. 611; 17 Am. Rep. 394; Nelson *v.* R. Co., 48 N. Y. 507.

4 Schneider *v.* Evans, 25 Wis. 241; 3 Am. Rep. 241; Briggs *v.* R. Co., 6 Allen, the Court saying: "The same person may be, and often is, not only a common carrier, but also the forwarding agent of the owner of the goods to be transported. Story on Bailments, §§ 502, 537. He must necessarily act in the latter capacity whenever he receives goods which are to be forwarded, not only on his own line, but to some distant point beyond it on the line of the next carrier, or on that of the last of several successive carriers, on the regular and usual route and course of transportation, to which they are to be carried and there delivered to the consignee. The owner generally does not, and cannot always, accompany them, and give his personal directions to each one of the successive carriers. He therefore necessarily, in his own absence, devolves upon the carrier to whom he delivers the goods the duty, and invests him with the authority, to give the requisite and proper directions to each successive carrier, to whom, in due course of transportation, they shall be passed over for the purpose of being forwarded to their ultimate place of destination. Otherwise they would never reach that place. For the first carrier can only transport the goods over his own portion of the line; and if he is not authorized to give the carrier, with whose route his own connects, directions in reference to their further transportation, they must stop at that point; for although, in general, every carrier is bound to accept and forward all goods which are brought and tendered to him,

rier receives goods from an intermediate one, who neglects to inform him that the freight is paid through, the last carrier is not liable for this omission, and may hold the goods a reasonable time to ascertain the facts.[1]

If the connecting carrier will not, or cannot receive them, the first carrier must at once notify the shipper, and meanwhile hold them for him as a warehouseman,[2] and in every way he must use the diligence of a paid agent, in seeing that they are protected from loss or damage;[3] and must not be guilty of a mistake in instructing the second carrier as to the destination and delivery of the property.[4]

yet he is not so bound unless he is duly and seasonably informed and advised of the place to which they are to be transported. Story on Bailments, § 532; Judson *v.* Western Railroad, 4 Allen, 520. Hence it results, by inevitable implication, that when an owner of goods delivers them to a carrier to be transported over his route, and thence over the route of a succeeding carrier, or the routes of several successive carriers, he makes and constitutes the persons to whom he delivers them his forwarding agents, *for whose acts in the execution of that agency he is himself responsible.* And therefore, if the several successive carriers carry the goods according to the directions which are given by the forwarding agents, they act under the authority of the owner, and cannot in any sense be considered as wrong-doers, although they are carried to a place to which he did not intend that they should be sent. And in such case, the last carrier will be entitled to a lien upon the goods, not only for the freight earned by him on his own part of the route, but also for all the freight which has been accumulating from the commencement of the carriage until he receives them, which, according to a very convenient custom, which is now fully recognized and established as a proper and legal proceeding, he has paid to the preceding carriers."

1 Union Ex. Co. *v.* Shoop, 85 Pa. St. 325.

2 Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; Nutting *v.* R. Co., 1 Gray 502; Rawson *v.* Holland, 59 N. Y. 611; 17 Am. Rep. 394; Lesinsky *v.* Great West. Despatch Co., 10 Mo. (App.) 134; Louisville etc. R. Co. *v.* Campbell, 7 Heisk. 253; *re.* Peterson, 21 Fed. Rep. 885; see Deming *v.* R. Co., 21 Fed. Rep. 25.

3 Reagan *v.* R. Co., 61 N. H. 579; Sullivan *v.* Thompson, 101 Mass. 120. Where a contract gives the carrier an option between modes of transportation, the option must be exercised with a view to the owner's interest. Blitz *v.* Union S. S. Co., 51 Mich. 558; 17 N. W. Rep. 55.

4 Dana *v.* R. Co., 50 How. Pr. 428. Thus a carrier, who receives goods under a bill of lading containing instructions to deliver them at the end of its route "to the order" of the consignor "or his assigns," as well as marks and directions indicating a place beyond as their ultimate destination, and who, without giving like instructions, forwards them to that place by intermediate carriers, the last of whom delivers them up to the consignee without requiring him to produce the bill of lading, is liable for the value of the goods. North *v.* Merchants' Trans. Co., 146 Mass. 315; 15 N. E. Rep. 779.

If the first carrier receipts the goods to be transported to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting carrier is responsible to him for the excess.[1] So, where a railroad guarantees against overcharges by connecting carriers, it is liable for such an overcharge, and cannot escape liability by setting up an unconnected stipulation in the contract that it shall not be liable for damages to the goods after they have passed beyond its own line.[2]

The first carrier will still be liable for failing to deliver the goods to the connecting carrier with reasonable dispatch,[3] and likewise for any injury which occurs beyond his route through his own neglect, as by furnishing defective cars,[4] or defectively sealing packages containing valuables.[5]

§ 103. **Proof of Agreement to Carry Beyond Route.**—The question whether the carrier has undertaken to transport the goods to their destination though beyond his own route or not, is one of intention of the parties, and must be established either by an express contract,[6] or by evidence that the carrier

1 Detroit etc., R. Co. *v.* McKenzie; 43 Mich. 609; 5 N.W. Rep. 1031; Tardos *v.* R. Co., 35 La. Ann. 15.

2 Little Rock etc. R. Co. *v.* Daniels, 49 Ark. 352; 5 S. W. Rep. 584.

3 Fox *v.* R. Co., 19 N. W. Rep. 223 (Mass.); Bussey *v.* R. Co., 4 McCrary 405; Louisville etc. R. Co. *v.* Campbell, 7 Heisk. 253; Rawson *v.* Holland, 59 N. Y. 611; 17 Am. Rep. 394; Irish *v.* R. Co., 19 Minn. 376; 18 Am. Rep. 340; Bancroft *v.* R. Co., 47 Iowa 262; 29 Am. Rep. 482; Union etc. R. Co. *v.* Hurt, 30 Ga. 798. And it is no defense that the second carrier might have made up for his default in this respect. Phila. etc. R. Co. *v.* Lehman, 56 Md. 209.

4 Indianapolis etc. R. Co. *v.* Strain, 81 Ill. 504.

5 Overland etc. Mail Co. *v.* Carroll, 7 Colo. 43; 1 Pac. Rep. 682.

6 *Contracts Construed to be Through Contracts.*—When the goods are marked to a point beyond the carrier's line and the bill of lading or receipt leaves the place of destination blank, it is generally construed to be a through contract. Cutts *v.* Brainerd, 42 Vt. 566; 1 Am. Rep. 353; Fortier *v.* Penn. Co., 18 Ill. (App.) 260. So when the first carrier gave a receipt for goods "to be delivered on presentation of this receipt at C," a place beyond its route. Kyle *v.* R. Co., 10 Rich. (S. C.) 382. So when the contract read: "New York, Nov. 14, 1853. Received of J. H. S. six boxes * * to be forwarded per Hudson R. R. freight train to Chicago." Schroeder *v.* R. Co.,

held himself out as a common carrier for the entire distance,[1] or other circumstances indicating an understanding that the contract was for through transportation.[2]

An intention to make a through contract is shown by the receipt by the first carrier of the freight charges for the entire distance, or the giving of a through rate,[3] or where several companies carry over a line of which each is a link and they give through bills of lading

5 Duer, 55. And see St. Louis etc. R. Co. *v.* Pifer, 13 Kas. 505; Toledo etc. R. Co. *v.* Merriman, 52 Ill. 123; 4 Am. Rep. 590; Palmer *v.* Holland, 51 N. Y. 416; 10 Am. Rep. 616; Brown *v.* Mott, 22 Ohio St. 149; Hanson *v.* R. Co., 41 N. W. Rep. 529. For cases where the court construed the contract as one *not* for through carriage see Reed *v.* U. S. Exp. Co., 48 N. Y. 462; Converse *v.* R. Co., 33 Conn. 166; Am. Ex. Co. *v.* Second Nat. Bk., 69 Pa. St. 394; Pendergast *v.* Adams Ex. Co., 101 Mass. 120; East Tenn. R. Co. *v.* Montgomery, 44 Ga. 278; Merchants' etc. Trans. Co. *v.* Moore, 88 Ill. 136; 30 Am. Dec. 541; Myrick *v.* R. Co., 107 U. S. 102; 1 S. C. Rep. 425.

1 In ascertaining the relation existing between connecting lines of carriers the parties are not confined to what is said in the bill of lading; but the shipper may introduce the way bills of the carrier with whom his contract was made, the statements of the agents of the carrier made when the bill of lading was given, or any special contract or understanding between the parties at the time the goods were shipped. St. John *v.* Express Co., 1 Woods, 612; Harris *v.* R. Co., 16 Atl. Rep. 512 (Conn.); Robinson *v.* Merchants Dispatch Co., 45 Iowa 470; Root *v.* R. Co., 45 N. Y. 524; Railroad Co. *v.* Pratt, 22 Wall. 123; Hill Manf'g Co. *v.* R. Co., 104 Mass. 122; Quimby *v.* Vanderbilt, 17 N. Y. 306; Toledo etc. R. Co. *v.* Merriman, 52 Ill. 123; 4 Am. Rep. 590; Collender *v.* Dinsmore, 55 N. Y. 260.

2 Root *v.* R. Co., 45 N. Y. 524; Morse *v.* R. Co., 41 Vt. 550; Cutts *v.* Brainerd, 42 Vt. 566; 1 Am. Rep. 353; Najac *v.* R. Co., 7 Allen 328; Nashua Lock Co. *v.* R. Co., 48 N. H. 339; 2 Am. Rep. 242; Barter *v.* Wheeler, 49 N. H. 9; 6 Am. Rep. 434; Gray *v.* Jackson, 51 N. H. 9; 12 Am. Rep. 1; St. John *v.* Van Santvoord, 6 Hill, 158. It is a question of fact for the jury. Phila. etc. R. Co. *v.* Ramsey, 89 Pa. St. 474. The M. P. Ry. Co. received a piano at W., to be carried to L., and delivered to a connecting common carrier for transportation to P. At L. the track of the M. P. Ry. crossed the track of the B. & M. R. Co., the tracks and stations being connected by a Y. The piano was carried to L. by the M. P. Ry., and delivered to two draymen, to be transferred to the B. & M. R. Co. at its station. Before delivery to the last-named railroad company, and while in possession of the drayman, it fell out of the wagon and was broken, and was not received by the agent of the B. & M. R. Co. The Supreme Court held the M. P. R. Co. liable. Mo. Pac. R. Co. *v.* Young, 41 N. W. Rep. 641.

3 Weed *v.* R. R. Co., 19 Wend. 534; Rail road Co. *v.* Androscoggin Mills, 22 Wall. 594; Berg *v.* Steam. Co., 5 Daily, 394; Candee *v.* R. Co., 21 Wis. 582; 94 Am. Dec. 566; St. John *v.* Express Co., 1 Woods, 612; Atlanta etc. R. Co. *v.* Texas Grate Co., 9 S. E. Rep. 600 (Ga.); Clyde *v.* Hubbard, 88 Pa. St. 358; Aiken *v.* R. Co., 68 Ia. 363; Harris *v.* R. Co., 16 Am. Rep. 512.

Contra, McCarthy *v.* R. Co., 9 Mo. (App.) 159; East Tenn. R. Co. *v.* Montgomery, 44 Ga. 278.

and charge through freight.[1] Where there exists a partnership between a number of carriers, any one of them may be made liable for a loss or damage occurring on any part of the associated line.[2] If, however, the arrangement between the carriers does not amount to a partnership, but is a mere agreement *inter se*, as to the responsibility each will assume upon traffic over their lines, it gives no right to the shipper, for there is no privity between him and the carrier.[3]

§ 104. **Actual Delivery to Connecting Carrier Required.** —To end his responsibility, however, a proper delivery, in good order, to the connecting carrier is absolutely required. He cannot relieve himself of his liability as a common carrier and an insurer, by unloading the goods at the end of his route and storing them in a warehouse,[4] nor by merely notifying the con-

1 Houston etc. R. Co. *v.* Park, 1 Tex. App. Cas. 332; Texas etc. R. Co. *v.* Parrish, 1 Tex. App. Cas. 942; Mo. Pac. R. Co. *v.* Ryan, 2 Tex. App. Cas. 430; Loomis *v.* R. Co., 17 Mo. (App.) 340; Moore *v.* Henry, 18 Mo. (App.) 35; Wiggins Ferry Co. *v.* R. Co., 73 Mo. 389; Helliwell *v.* R. Co., 7 Fed. Rep. 68; Freeburg etc. Coal Co. *v.* R. Co., 10 Mo. (App.) 597; Richards *v.* The Charles P. Chouteau, 37 Fed. Rep. 532; Harp *v.* The Grand Era, 1 Woods, 184; Myrick *v.* R. Co., 9 Biss, 44.

2 Schulter *v.* Adams Ex. Co., 5 Mo. (App.) 316; Barrett *v.* R. Co., 9 Mo. (App.) 726; Wyman *v.* R. Co., 4 Mo. (App.) 35; Clarkson *v.* Erie etc. Dispatch Co., 6 Ill. (App.) 284; Nashua Lock Co. *v.* R. Co., 48 N. H. 339; 2 Am. Rep. 242; Block *v.* R. Co., 139 Mass. 308; 1 N. E. Rep. 348; Case *v.* Baldwin, 136 Mass. 90; see Wilson *v.* R. Co., 21 Cratt. 654; Carter *v.* Peck, 4 Sneed, 203; 67 Am. Dec. 604; Montgomery etc. R. Co. *v.* Moore, 51 Ala. 394; Ellsworth *v.* Tartt, 26 Ala. 733; 62 Am. Dec. 749; Briggs *v.* Vanderbilt, 19 Barb. 222; Gass *v.* R. Co., 99 Mass. 220; 96 Am. Dec. 742; Weyland *v.* Elkins, Holt N. P. 227; 1 Stark. 272; Laugher *v.* Painter, 5 Barn. & C. 475; Gill *v.* R. Co., L. R. 8 Q. B. 136; Cobb *v.* Abbot, 14 Pick. 289; Pattison *v.* Blanchard, 5 N. Y. 186; Converse *v.* Norwich etc. Trans. Co., 33 Conn. 166; Cincinnati etc. R. Co. *v.* Spratt, 2 Duv. 4; Hart *v.* R. Co., 8 N. Y. 37; 59 Am. Dec. 447; Bostwick *v.* Champion, 11 Wend. 571; Champion *v.* Bostwick, 18 Wend. 175; 31 Am. Dec. 376; Fromont *v.* Coupland, 2 Bing. 170; Nashua Lock Co. *v.* R. Co., 48 N. H. 339; 2 Am. Rep. 242; Barter *v.* Wheeler, 49 N. H. 9; 6 Am. Rep. 434.

3 Aigen *v.* R. Co., 132 Mass. 423; St. Louis etc. Ins. Co. *v.* R. Co., 104 U. S 146; Hot Springs R. Co. *v.* Trippe, 42 Ark. 465; 48 Am. Rep. 65; Citizens Ins. Co. *v.* Kountz Line, 4 Woods, 268; Gass *v.* R. Co., 99 Mass. 220; 96 Am. Dec. 742.

4 Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; Dresbach *v.* R. Co., 57 Cal. 462; Kansas City Trans. Co. *v.* Neiswanger, 18 Mo. (App.) 103; Condon *v.* R. Co., 55 Mich. 218; re Peterson, 21 Fed. Rep. 885; Eaton *v.* Newmark, 33 Fed. Rep. 891; Lewis *v.* R. Co., 11 Metc. 509; Mobile etc. R. Co. *v.* Hopkins, 41 Ala. 486; McDonald *v.* R. Co., 34 N. Y. 497; Fenner *v.* R. Co., 44 N. Y. 505; 4 Am. Rep. 505; Mills *v.* R. Co., 45 N. Y. 622; Reed *v.* U. S. Ex. Co.,

necting carrier that the goods have arrived, and asking him to send for them;[1] nor by placing the goods in a depot used by him and a connecting carrier in common; it not being shown that they were placed on the platform of the connecting carrier, or had been in some manner given over to him[2]—in which case the delivery to the second carrier would be considered complete.[3]

§ 105. **Aliter as Between the Carriers Themselves.** —"As between the connecting carriers themselves, it is undoubtedly true that by express agreement, by usage and custom in a particular trade, or from the course of dealing between the particular carriers, the responsibility may be changed from one to another by what is known as constructive delivery, which implies no actual or manual transfer of the possession of the goods. But as to the owner of the goods, the doctrine of constructive delivery can have no application, and he can be required to look for the reparation of his loss only to the carrier in the actual possession when it occurred; and the carrier whose duty it was to make the delivery to the succeeding one, will be presumed to have still had the possession until it be shown that it had been actually transferred to another."[4] The

48 N. Y. 402; Root *v.* R. Co., 45 N. Y. 524; Dunson *v.* R. Co., 3 Lans. 265; Michaels *v.* R. Co., 30 N. Y. 564; Gass *v.* R. Co., 99 Mass. 320; West. Trans. Co. *v.* Newhall, 24 Ill. 477; Merchants' Desp. Co. *v.* Kahn, 76 Ill. 520; Ill. Cent. R. Co. *v.* Mitchell, 68 Ill. 471; 18 Am. Rep. 564; Ætna Ins. Co. *v.* Wheeler, 5 Lans. 480; 49 N Y. 616; South. Ex. Co. *v.* Hess, 53 Ala. 19; Brintnall *v.* R. Co., 32 Vt. 665; Wahl *v.* Holt, 26 Wis. 703; Louisville etc. R. Co. *v.* Campbell, 7 Heisk. 253; Irish *v.* R. Co., 18 Minn. 376; 18 Am. Rep. 340; Lawrence *v.* R. Co., 15 Minn. 390; 2 Am. Rep. 130; Conkey *v.* R. Co., 31 Wis. 619; 11 Am. Rep. 631; overruling Wood *v.* R. Co., 27 Wis. 541; 9 Am. Rep. 465, where it had been ruled that the liability of the first carrier continues only until the goods are ready for the connecting carrier and he has had a reasonable time in which to take them away.

1 Gould *v.* Chapin, 20 N. Y. 259; 75 Am. Dec. 378; Miller *v.* Nav. Co., 10 N. Y. 431; Selma etc. R. Co. *v.* Butts, 43 Ala. 385; 94 Am. Dec. 694; Hermann *v.* Goodrich, 21 Wis. 543; 94 Am. Dec. 562; Palmer *v.* R. Co., 6 New Eng. Rep. 470 (Conn.)

2 Kent *v.* R. Co., L. R. 10 Q. B. 1; Conkey *v.* R. Co., 31 Wis. 619; 11 Am. Rep. 630.

3 Converse *v.* Norwich etc. Trans. Co., 33 Conn. 166; Pratt *v.* R. Co., 95 U. S. 43.

4 Hutch. Carr. § 104; Palmer *v.* R. Co., 13 Atl. Rep. 818 (Conn.)

owner, though not obliged to, may sue and recover his loss from the connecting carrier to whom the goods have been only constructively delivered.[1] In all the States (except Georgia[2]), the action may be brought against the carrier in whose custody the goods were at the time of the loss or injury, there being a sufficient privity between the shipper and the connecting carrier to enable him to sue on the contract of shipment made with the first carrier.[3]

§ 106. **Receipt of Goods Marked to Place Beyond Route—The English Rule.**—It is the doctrine of the English courts that where a carrier receives goods directed to a place beyond his route, and does not, by contract, limit his responsibility to the end of his own route, he engages to deliver them at their destination, and is liable as such until so delivered.[4] He, and not the connecting carrier, must be sued, even where the loss takes place beyond his own line.[5] The English rule is followed in Georgia.[6] In several States, the doctrine of the English courts is adhered to, with the difference that the shipper is given his choice of suing the first carrier, or the one in whose actual custody the goods were when the loss or damage occurred.[7]

1 Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; Packard *v.* Taylor, 35 Ark. 402; 37 Am. Rep 37; Mo. Pac. R. Co. *v.* R. Co., 25 Fed. Rep. 317; South. Ex. Co. *v.* McVeigh, 20 Gratt. 264.

2 See *post* § 106.

3 Packard *v.* Taylor, 35 Neb. 420; 37 Am. Rep. 57; Halliday *v.* R. Co., 74 Mo. 159; 41 Ala. 309; Independence Mills Co. *v.* R. Co., 72 Iowa, 535; Atchison etc. R. Co. *v.* Roach, 35 Kas. 740; South. Ex. Co. *v.* Van Meter, 17 Fla. 803; Conkey *v.* R. Co., 31 Wis. 619; 11 Am. Rep. 630.

4 Muschamp *v.* R. Co., 8 M. & W. 421; Collins *v.* R. Co., 11 Ex. 800; Coxon *v.* R. Co., 5 Hurl. & N. 274.

5 *Id.* Scothorn *v.* R. Co., 8 Ex. 341.

6 Mosher *v.* South. Ex. Co., 38 Ga. 37; Cohen *v.* South. Ex. Co., 45 Ga. 148; South. Ex. Co. *v.* Shea, 38 Ga. 519; Falvey *v.* R. Co., 76 Ga. 577; 2 Am. St. Rep. 58; Savannah etc. R. Co. *v.* Pritchard, 77 Ga. 412; Southeastern R. Co. *v.* Thornton, 71 Ga. 61; Central R. Co. *v.* Combs, 70 Ga. 533; 48 Am. Rep. 582. But see the Ga. Code, § 2084.

7 *Alabama*—Mobile etc. R. Co. *v.* Copeland, 63 Ala. 219; 35 Am. Rep. 219; Louisville etc. R. Co. *v.* Myer, 78 Ala. 597; Alabama etc. R. Co. *v.* Mount Vernon Co., 4 South. Rep. 556. *Florida*—Bennett *v.* Filyaw, 1 Fla. 403. *Illinois*—Illinois Central R. Co. *v.* Frankenberg, 54 Ill. 88; 5 Am. Rep. 92; Erie R. Co. *v.* Wilcox, 84

In support of this doctrine, it is argued that a shipper must rely on the carrier with whom he deals. He can not be supposed to know the particular portion of the transit which the first carrier controls, much less the other owners or proprietors of the continuous line. He intends to make one contract, but not two or three or half a dozen. When he places his property in the hands of the carrier, he at once loses all control over it. If it is not delivered, how is he to discover at what particular portion of the route it was lost? He would be forced to rely on the statements of the carriers themselves, who would be little likely to aid him in his search. If he did succeed in fixing the responsibility, he might find himself obliged to assert his claim against a party hundreds of miles away, and under circumstances which might well discourage a prudent man, and induce him to bear his loss rather than incur the expense and trouble of pursuing his remedy against so distant a defendant. The first carrier, on the contrary, has facilities for tracing the loss, not possessed by the public. He is in constant communication with his associates in the business; he has their receipts for the property delivered to them, and with no inconvenience at all, could charge the loss to his negligent agent.[1]

Ill. 239; 25 Am. Rep. 451; Illinois Central R. Co. *v.* Copeland, 24 Ill. 332; 76 Am. Dec. 749; Chicago etc. R. Co. *v.* People, 56 Ill. 365; 8 Am. Rep. 690; U. S. Express Co. *v.* Haines, 67 Ill. 137; Milwaukee etc. R. Co. *v.* Smith, 84 Ill. 239; Field *v.* R. Co., 71 Ill. 458; Illinois Central R. Co. *v.* Johnson, 34 Ill. 389; Adams Express Co. *v.* Wilson, 81 Ill. 339; Illinois Central R. Co. *v.* Cowles, 32 Ill. 116; Chicago etc. R. Co. *v.* Montfort, 60 Ill. 175; Wabash etc. R. Co. *v.* Jaggerman, 115 Ill. 407; Fortier *v.* Penn. Co., 18 Ill. (App.) 260; Ohio etc. R. Co. *v.* Enrich, 24 Ill. (App.) 245. *Iowa*—Mulligan *v.* R. Co., 36 Iowa, 181; 14 Am. Rep. 514; Angle *v.* R. Co., 9 Iowa, 493. *New Hampshire*—Lock Co. *v.* R. Co., 48 N. H. 339; Gray *v.* Jackson, 51 N. H. 9; 12 Am. Rep. 1. *Tennessee*—Louisville etc. R. Co. *v.* Campbell, 7 Heisk. 253; Western etc. R. Co. *v.* McElwee, 6 Heisk, 208; Carter *v.* Hough, 4 Sneed, 203; East Tennessee R. Co. *v.* Nelson, 1 Cold. 272; East Tennessee R. Co. *v.* Rogers, 6 Heisk. 143; 19 Am. Rep. 589; Louisville etc. R. Co. *v.* Weaver, 9 Lea. 38.

[1] See arguments of Rolfe, J., in Muschamp *v.* R. Co., *supra;* Lord Cranworth in Directors *v.* Collins, 7 H. L. Cas. 194; Channell, B., in Wilby *v.* R. Co., 2 H. & N. 707; Perley, J., in Lock Co. *v.* R. Co., *supra;* Breese, J., in Ill. Cent. R. Co. *v.* Frankenberg, *supra;* Freeman, J., in East Tenn. R. Co. *v.* Rogers, *supra*, and in Western etc. R. Co. *v.* McElwee, *supra.*

§ 107. **The American Rule.**—But the prevailing rule in the United States is, that the acceptance of goods directed to a point beyond the carrier's line, is considered to imply nothing more than an agreement on the part of the carrier to transport to the end of his route and there deliver to a connecting carrier to complete the carriage, the courts considering it not just that the extraordinary liability of a common carrier shall be extended beyond his own routes, where alone he has an opportunity of choosing for himself his servants, and of guarding the property entrusted to his care.[1]

The English doctrine, as followed in several of the States, appears to be founded upon reason and justice,

[1] *Federal Courts*—Railroad Co. *v.* Pratt, 22 Wall. 123; Railroad Co. *v.* Mfg. Co., 16 Wall. 318; Stewart *v.* R. Co., 10 Rep. 618; 1 McCrary, 312; Myrick *v.* R. Co. 107 U. S. 102; Sumner *v.* Walker, 30 Fed. Rep. 261; Central Trust Co. *v.* R. Co., 31 Fed. Rep. 247; St. Louis Ins. Co. *v.* R. Co., 104 U. S. 146. *Arkansas*—St. Louis etc. R. Co. *v.* Weakly, 50 Ark. 379; 7 Am. St. Rep. 104; Little Rock etc. R. Co. *v.* Glidewell, 39 Ark. 487. *Connecticut*—Converse *v.* R. Co., 33 Conn. 166; Hood *v.* R. Co., 22 Conn. 502; Elmore *v.* R. Co., 23 Conn. 457; 63 Am. Dec. 143. *Kansas*—Berg *v.* Atchison etc. R. Co., 30 Kas. 561. *Maine*—Inhabitants v. Hall, 61 Me. 517; Skinner *v.* Hall, 60 Me. 477; Perkins *v.* R. Co., 47 Me. 573; 74 Am. Dec. 507. *Maryland*—Baltimore etc. R. Co. *v.* Schumacher, 29 Md. 168; 96 Am. Dec. 510. *Massachusetts*—Burroughs *v.* R. Co., 100 Mass. 26; 1 Am. Rep. 78; North *v.* Merchants' etc. Co., 146 Mass. 315; Darling *v.* R. Co., 11 Allen, 295; Nutting *v.* R. Co., 1 Gray, 502. *Michigan*—McMillan *v.* R. Co., 16 Mich. 79; 93 Am. Dec. 208; Detroit etc. R. Co. *v.* McKenzie, 43 Mich. 609; Fleming *v.* Mills, 5 Mich. 420. *Minnesota*—Irish *v.* R. Co., 19 Minn. 376; 18 Am. Rep. 340; Ortt *v.* R. Co., 36 Minn. 396. *Mississippi*—Crawford *v.* Southern R. Ass'n, 51 Miss. 222; 24 Am. Rep. 626. *Missouri*—McCarthy *v.* R. Co., 9 Mo. (App.) 159; Grover etc. Machine Co. *v.* R. Co., 70 Mo. 672; 35 Am. Rep. 444; Snider *v.* Express Co., 63 Mo. 376; Dimmitt *v.* R. Co., 103 Mo. 422, Afterwards changed by statute. *New Hampshire*—Gray *v.* Jackson, 51 N. H. 9; 12 Am. Rep. 1. *New York*—Babcock *v.* R. Co., 49 N. Y. 491; Root *v.* R. Co., 45 N. Y. 524; Reed *v.* United States Express Co., 48 N. Y. 462; 7 Am. Rep. 561; Condict *v.* R. Co., 59 N. Y. 500; St. John *v.* Van Santvoord, 25 Wend. 660; 6 Hill 157; Lamb *v.* R. Co., 46 N. Y. 271; 7 Am. Rep. 327; Weil *v.* Merchants' Trans. Co., 7 Daly 456. *North Carolina*—Phillips *v.* R. Co., 78 N. C. 294; Knott *v.* R. Co., 98 N. C. 73; 2 Am. St. Rep. 321. *Pennsylvania*—Camden etc. R. Co. *v.* Forsyth, 61 Pa. St. 81. *Rhode Island*—Knight *v.* R. Co., 13 R. I. 572; 43 Am. Rep. 46; Harris *v.* R. Co., 15 R. I. 571. *South Carolina*—Piedmont Manfg. Co. *v.* R. Co., 19 S. C. 353. *Vermont*—Farmers' etc. Bank *v.* Champlain Trans. Co., 16 Vt. 52; 42 Am. Dec. 491; Cutts *v.* Brainard, 42 Vt. 566; 1 Am. Rep. 353; Hadd *v.* U. S. Express Co., 52 Vt. 355; 36 Am. Rep. 747.

and has been approved in Missouri by recent legislation.[1]

§ 108. **Right of Connecting Carriers to Exemptions in First Contract.**—The first carrier, in his bill of lading may provide that its stipulations shall extend to and inure to the benefit of each and every company or person to whom the carrier issuing it may intrust or deliver the property, in which case its terms will define and limit the liability of every succeeding carrier.[2] And though the contract with the first carrier does not reserve to connecting carriers the benefit of its limitations and conditions, yet a connecting carrier who receives goods from another to be forwarded to their destination, is entitled to the exceptions which the latter has made with the shipper, in case the contract with the original carrier was for the entire route.[3] Thus, where a carrier receives goods to be carried to a place beyond its route, a condition in the bill of lading that they are shipped at "owner's risk," protects—so

[1] R. S. Mo. 1889 § 944. Of this statute the Supreme Court says: "The purpose of the legislature was to prescribe a definite rule of liability for negligence of a common carrier in harmony with what has been denominated the English rule upon the subject." Dimmitt *v.* R. Co., 103 Mo. 433; 15 S. W. Rep. 761. But the carrier may still make a special agreement limiting his liability to his own line. Dimmitt *v.* R. Co., *supra*, and an agreement of this kind will cover a negligent loss on the connecting line. Nines *v.* R. Co., 107 Mo. 475; 18 S. W. Rep. 26 (overruling Heil *v.* R. Co., 16 Mo. (App.) 363; McCann *v.* Eddy, 27 S. W. Rep. 541 (Mo.); and see Craycroft *v.* R. Co., 18 Mo. (App.) 487; Orr *v.* R. Co., 21 Mo. (App.) 333.

[2] U. S. Express Co. *v.* Harris, 51 Ind. 127; Levy *v.* South. Express Co., 4 S. C. 234; Whitworth *v.* R. R. Co., 45 N. Y. 602; 87 N. Y. 414. The carrier on whose road the loss occurred, when sued for damages, must allege and prove, in order to get the benefit of an exemption from liability in the bill of lading given by a different carrier and in a different state, that the exemption is allowed by the law of the state where the goods were shipped. International etc. R. Co. *v.* Moody, 9 S. W. Rep. 465 (Tex.)

[3] Maghee *v.* R. Co., 46 N. Y. 514; 6 Am. Rep. 125; Manhattan Oil Co. *v.* R. Co., 54 N. Y. 197; Lamb *v.* R. Co., 2 Daly, 454; 46 N. Y. 271; 7 Am. Rep. 327; Railroad Co. *v.* Androscoggin Mills, 22 Wall. 594; Halliday *v.* R. Co., 74 Mo. 159; 41 Am. Rep. 309: St. Louis etc. R. Co. *v.* Weakly, 50 Ark. 104; 7 Am. St. Rep. 104; Oakey *v.* Gordon, 7 La. Ann. 235; Hall *v.* R. Co., L. R. 10 Q. B. 437; Bristol etc. R. Co. *v.* Collins, 7 H. L. 414; Merchants' Trans. Co. *v.* Bolles, 80 Ill. 473; U. S. Ex. Co. *v.* Harris, 51 Ind. 127; Babcock *v.* R. Co., 49 N. Y. 491; Taylor *v.* R. Co., 39 Ark. 148.

far as it goes—all the lines which may handle the goods, until they reach their destination.[1] The reason is that the connecting carrier is the agent of the first carrier, and can legally claim the benefit of any contract made with his principal.[2]

But where a bill of lading specifies certain railroads over which goods are to be carried, and the goods are sent a part of the way by a road not thus mentioned, such road will not be entitled to its exceptions.[3]

§ 109. **Power of First Carrier to Contract with Connecting Carriers.**—As an agent to ship has an implied authority to contract respecting the terms of shipment,[4] and as the first carrier (when the contract is not a through one) "is certainly employed by the owner to deliver the goods to the second carrier just as plainly as a carman is employed by a merchant;"[5] it can hardly be disputed[6] that he has an implied authority to accept a bill of lading, or to make a contract containing exemptions from liability, with the connecting carrier, provided, those exceptions are those contained in the original contract and no other.[7]

1 Kiff *v.* R. Co., 32 Kas. 263. 4 Pac. Rep. 401.

2 See Owen *v.* R. Co., 9 S. W. Rep. 698.

3 Merchants' Dispatch Co. *v.* Bolles, 80 Ill. 473.

4 New Jersey Steam. Co. *v.* Merchants Bk., 6 How. 344; Squire *v.* R. Co., 98 Mass. 239; Steers *v.* Liverpool Steam. Co., 57 N. Y. 1; Rawson *v.* Holland, 59 N. Y. 611; Moriarity *v.* Harnden's Ex., 1 Daly, 227; Christenson *v.* American Ex. Co., 15 Minn. 270; Shelton *v.* Merchants' Dispatch Trans. Co., 36 N. Y. (S. C.) 527; 59 N. Y. 258; Robinson *v.* Merchants' Dispatch Trans. Co., 45 Iowa 470; Meyer *v.* Harnden's Ex. Co., 24 How. Pr. 290; Bean *v.* Green, 12 Me. 422; Fillebrown *v.* R. Co., 55 Me. 462; Levy *v.* Southern Ex. Co., 4 S. C. 242; Ill. Cent. R. Co. *v.* Jonte, 13 Ill. (App.) 424; Hus *v.* Kempf, 10 Ben. 321; Hill *v.* R. Co., 144 Mass. 284; Jennings *v.* R. Co., 5 N. Y. (Supp.) 140; Hutchings *v.* Ladd, 16 Mich. 5. Aliter where the carrier knows the agent has no authority. Moses *v.* R. Co., 24 N. H. 71; The Pacific, 1 Deady. 17.

5 Wheel. Carr. 277.

6 Though the authority is questioned by Allen J. in Babcock *v.* R. Co., 49 N. Y. 491.

7 Lamb *v.* R. Co., 46 N. Y. 271. But following the rule as to *notices* (see *post* § 140) the shipper is not bound by any notice or regulations of the second carrier not assented to by the first. Judson *v.* R. Co., 6 Allen, 485; Mich. Cent. R. Co. *v.* Hale, 6 Mich. 243; Railroad Co. *v.* Pratt, 22 Wall. 123; Adams Ex. Co. *v.* Harris, 21 N. E. Rep. 340.

But when the first carrier's contract is not a through one, but is only to carry to the end of his line, and then pass the goods over to a connecting carrier, the latter, (unless the first carrier has expressly reserved to him the benefit of the exceptions in the contract), cannot claim the benefit of the provisions of the original contract.[1]

§ 110. **Other Rights and Liabilities of Connecting Carriers.**—The second carrier cannot sue the first one for failing to deliver goods to him which the first carrier had transported to the point of connection, even though the shipper of the goods had contracted with the first carrier to have them shipped over the road of the second carrier.[2] There is in such case no privity between the parties. The connecting carriers are not bound by the contract of the first carrier as to rates of freight,[3] not even where the first carrier has guaranteed that the rate over the connecting line shall not be above a certain amount.[4] A connecting carrier is entitled to his charges for his carriage, though the consignor had directed that the goods should be carried from the terminus of the first carrier's line to their destination by another carrier than the one to whom they were delivered,[5] unless the connecting carrier knew of such direction.[6]

[1] Adams Ex. Co. *v.* Harris, 21 N. E. Rep. 875 (Ind.); Burroughs *v.* R. Co., 34 N. W. Rep. 875 (Mich.); Taylor *v.* R. Co., 39 Ark. 148; Bancroft *v.* Merchants' Dispatch Co., 47 Ia. 462; 29 Am. Rep. 412; Martin *v.* Am. Ex. Co., 19 Wis. 336; Camden etc. R. Co. *v.* Forsyth, 61 Pa. St. 81; Merchants' Trans. Co. *v.* Bolles, 80 Ill. 473; Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616; 5 Lans. 480; Babcock *v.* R. Co., 49 N. Y. 491.

[2] Wilmington etc. R. Co. *v.* Greenville etc. R. Co., 9 S. C. 325; 30 Am. Rep. 23 (1877).

[3] In the absence, of course, of any partnership between them or any authority given by one to the other to make contracts. Sumner *v.* R. Co., 7 Baxt. 345; 32 Am. Rep. 865; Lewis *v.* R. Co., 25 S. C. 249; Crossan *v.* R. Co., 21 N. E Rep. 367; Georgia R. Co. *v.* Murray, 11 S. E. Rep. 779.

[4] The remedy of the shipper in such case is against the first carrier on his guaranty. Schneider *v.* Evans, 25 Wis. 241; 3 Am. Rep. 56.

[5] Price *v.* R. Co., 21 Pac. Rep. 188.

[6] Denver etc. R. Co. *v.* Hill, 21 Pac. Rep. 914.

The connecting carrier is not liable for a loss or injury on the line of a prior carrier.[1] So, the intermediate one of several successive carriers, whatever his liability may be to the carrier to whom the goods were delivered by the shipper, is not liable to the shipper for the negligence or overcharge of carriers subsequent to himself, the contract for carriage having been made by the shipper with the initial carrier.[2]

When the connecting carrier receives the goods, he must forward them without delay, and cannot excuse a delay on the ground of a regulation that goods so received are not to be forwarded until the first carrier presents his bill for back charges.[3]

§ 111. **Presumption as to Time of Damage.**— Where a connecting carrier is sued for an injury to goods which were delivered to the initial carrier in good order, the presumption is that he received them in the same condition, and the burden is on the defendant to explain the injury,[4] and this rule is not changed by the fact that the last carrier transports them over its line in the foreign car in which he received them.[5]

But it must be shown that the goods were in good condition when delivered to the first carrier. To show that they were in good condition when packed at the shipper's house before shipment, is not enough.[6]

1 Lowenburg *v.* Jones, 56 Miss. 688; 31 Am. Rep. 379; Sumner *v.* Walker, 30 Fed. Rep. 261.

2 Hill *v.* R. Co., 60 Iowa 196; 14 N. W. Rep. 249.

3 Dunham *v.* R. Co., 70 Me. 164; 35 Am. Rep. 314; Michaels *v.* R. Co., 30 N. Y. 564; 86 Am. Dec. 425, the Court saying: "Its (the first carrier) omission to do so or to give notice that such charges existed should have been taken as evidence by the defendant that in fact there were no back charges."

4 Smith *v.* R. Co., 43 Barb. 225; 41 N. Y. 620; Laughlin *v.* R. Co., 28 Wis. 204; 9 Am. Rep. 493; Shriver *v.* R. Co., 24 Minn. 506; 31 Am. Rep. 353; Dixon *v.* R. Co., 74 N. C. 538, approving the Laughlin case above; Memphis etc. R. Co. *v.* Holloway, 9 Baxt. 189. *Contra*, Marquette etc. R. Co. *v.* Kirkwood, 45 Mich. 51; 40 Am. Rep. 453 (1880). Goods received by a railroad company from a connecting road, and carried over its line, are presumed to have been received "as in good order" within Ga. Code, § 2084; Central R. Co. *v.* Rogers, 66 Ga. 251. See South. etc. R. Co. *v.* Wood, 71 Ala. 215; 46 Am. Rep. 309.

5 Leo *v.* R. Co., 30 Minn. 438; 15 N. W. Rep. 872.

6 Lake Erie etc., R. Co. *v.* Oakes, 11 Ill. App. 489.

CHAPTER XI.

THE RESPONSIBILITY DURING TRANSIT.

SECTION 112. Carrier's Responsibility Begins on Delivery.
113. Actual or Constructive Acceptance Necessary.
114. At What Place Must Delivery be Made.
115. To Whom Must Delivery be Made.
116. Delivery According to Usage and Custom.
117. Common Carrier a Bailee for Hire.
118. Common Carrier Likewise an Insurer.
119. Exceptions to his Liability as Insurer.
120. The "Act of God."
121. Discordant Decisions.
122. Cases not Within the "Act of God."
123. The Question of Negligence Immaterial.
124. "Act of God" Must be Exclusive Cause.
125. Negligence and "Act of God" Concurring.
126. Loss by "Act of God" after Delay.
127. Loss by "Act of God" after Deviation.
128. Duty of Carrier to Preserve Goods Damaged by "Act of God."
129. The Public Enemy.
130. Losses Caused by Inherent Defects in Goods Carried.
131. Losses Caused by Seizure under Process.
132. Losses Caused by Act or Omission of Owner.
133. Losses Caused through Fraud of Owner.
134. Losses Caused by Neglect of Owner.
135. Owner Undertaking Part of Carrier's Duties.

§ 112. **Carrier's Responsibility Begins on Delivery.** —As soon as the goods have been given into the custody of the carrier, with the charges paid or without the carrier having insisted upon prepayment, his liability for loss or damage at once arises,[1] and it mat-

[1] Grosvenor *v.* R. Co., 39 N. Y. 34; Brand *v.* Dale, 8 Car. & P. 207; Maybin *v.* R. Co., 7 Rich. 240; 64 Am. Dec. 753; Fitchburg etc. R. Co. *v.* Hanna, 6 Gray, 536; 66 Am. Dec. 427; O'Bannon *v.* Ex. Co., 51 Ala. 481; Ill. Cent. R. R. Co. *v.* Smyser, 38 Ill. 354; 87 Am. Dec. 301; Judson *v.* R. Co., 4 Allen, 520; 81 Am. Dec. 718; Railroad Co. *v.* Barrett, 36 Ohio St. 452.

ters not that no formal contract has been signed or delivered,[1] or no receipt has been given for them.[2] Whenever a delivery of the goods has taken place, a transfer of the responsibility takes place at the same time. Even although the transit of the goods may not take place immediately, the duty of the carrier is not postponed until the journey actually begins. His duty is to keep safely and to carry safely.[3] But for goods received upon the premises of the carrier to await orders before transportation, he is liable as a warehouseman only until the orders are received.[4] And after the relation of carrier to the goods has become established by their delivery to him for immediate transportation, it may be changed to that of a warehouseman by subsequent orders by the owner to delay the forwarding of them.[5] If the shipper retains the custody of the goods himself, or sends his servant along for that purpose, the carrier's liability as an insurer does not attach.[6] In such cases, the owner, so far from having made delivery to the carrier, has purposely withheld it. He has not trusted the carrier, and where there has been no trust reposed, there is no liability;[7] though, if the carrier have the entire custody or control of the goods, the fact that the owner or his ser-

1 Gulliver *v.* Adams Ex. Co., 38 Ill. 503; Sherman *v.* Steam. Co., 26 Hun. 107; Ill. Cent. R. Co. *v.* Smyser, 38 Ill. 354; 87 Am. Dec. 30; East. etc. R. Co. *v.* Hall, 64 Tex. 615.

2 Hickox *v.* R. Co., 31 Conn. 281; 83 Am. Dec. 145.

3 Clarke *v.* Needles, 25 Pa. St. 338; Ill. Cent. R. Co. *v.* Smyser, 38 Ill. 354; 87 Am. Dec. 30; Grand Tower etc. R. Co. *v.* Ullman, 89 Ill. 244; Blossom *v.* Griffin, 3 Kern. 569; Wade *v.* Wheeler, 47 N. Y. 658; Michigan etc. R. Co. *v.* Schutz, 7 Mich. 515; Moses *v.* R. R. Co., 24 N. H. 71; 55 Am. Dec. 222.

4 Barron *v.* Eldredge, 100 Mass. 455; 1 Am. Rep. 126; O'Neil *v.* R. Co., 60 N. Y. 138; Wade *v.* Wheeler, 3 Lans. 201; Little Rock etc. R. Co. *v.* Hunter, 42 Ark. 200.

5 St. Louis etc. R. Co. *v.* Montgomery, 39 Ill. 335.

6 East. India Co. *v.* Pullen, 2 Strange, 690; Cohen *v.* Frost, 2 Duer. 335; Tower *v.* R. Co., 7 Hill, 47; 42 Am. Dec. 36; Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455; Yerkes *v.* Sabin, 97 Ind. 141; 49 Am. Rep. 434; Wyckoff *v.* Ferry Co., 52 N. Y. 32; 11 Am. Rep. 650; Stone *v.* Wyatt, 31 Me. 409; 52 Am. Dec. 621.

7 Hutch. Carr., § 86.

vant accompanies them merely to have an eye upon them, does not relieve the carrier from responsibility.[1]

§ 113. **Actual or Constructive Acceptance Necessary.** —There must, however, be either an actual or constructive acceptance by the carrier, or the contract to carry will not arise.[2] Leaving goods on a dock, without notice to the carrier;[3] or merely leaving goods on a carrier's premises;[4] or putting them in a carrier's vehicle without his knowledge;[5] or leaving them at his ordinary place of receiving, at an hour when he was not accustomed to receive goods,[6] would not be sufficient. The reason is, that to charge a carrier with the loss of an article which has never come into his possession, or to hold him responsible for the loss of an article of which he has never had an opportunity of taking care, would be eminently unjust.[7]

§ 114. **At What Place Must Delivery be Made.** —The delivery must be made at the ordinary and usual receiving place of the carrier,[8] unless the carrier has accepted them elsewhere, as he has a right to do.[9]

§ 115. **To Whom Must Delivery be Made.**—The delivery may, of course, be to the agent of the carrier.[10] Ordinarily, a person in charge of the place or present there, and acting as such, must be presumed to have authority to accept for the carrier,[11] unless such an act

1 Hutch. Carr., § 86.

2 Ill. Cent. R. Co. *v.* Smyser, 28 Ill. 354; 87 Am. Dec. 301.

3 Packard *v.* Getman, 6 Cow. 757; 16 Am. Dec. 475; Merriam *v.* R. Co., 20 Conn. 354; 52 Am. Dec. 344.

4 Buckman *v.* Levi, 3 Camp. 414; Grosvenor *v.* R. Co., 39 N. Y. 34.

5 Leigh *v.* Smith, 1 Car. & P. 638.

6 Browne Carr., § 89.

7 Browne Carr., § 90.

8 Cronkite *v.* Wells, 32 N. Y. 247; Blanchard *v.* Isaacs, 3 Barb. 388; Wells *v.* R. Co., 6 Jones, 47; 72 Am. Dec. 556.

9 Hutch. Carr., § 87; Browne Carr., §§ 87, 89; Ill. Cent. R. Co. *v.* Smyser, 38 Ill. 354; 87 Am. Dec. 301; Phillips *v.* Earle, 8 Pick. 182.

10 Rogers *v.* R. Co., 2 Lans. 269; Ouimet *v.* Henshaw, 35 Vt. 605; Minter *v.* R. Co., 41 Mo. 505; 97 Am. Dec. 289.

11 Cronkite *v.* Wells, 32 N. Y. 247; Rogers *v.* R. Co., 2 Lans., 269; Ouimet *v.* Henshaw, 35 Vt. 605; Whitbeck *v.* Schuyler, 47 Barb. 469.

is clearly from the scope of his employment beyond his authority.[1]

The same rule applies to contracts made by the carrier's servants by which the carrier's responsibility is increased.[2] As common carriers, especially at the present day, transact the greater part, if not all of their business with the public through agents and servants, it is proper that the public shall have a right to assume that they are authorized to do whatever they attempt to do.[3]

§ 116. **Delivery According to Usage and Custom.** —A delivery made in accordance with an established usage and custom will always bind the carrier;[4] even had there been no such usage, the person would have had no authority,[5] or the place would have been an improper one,[6] or the time an unreasonable one.[7] But

1 As, for example, a deckhand of a steamboat. Trowbridge *v.* Chapin, 23 Conn. 595; Ford *v.* Mitchell, 21 Ind. 54.

2 Winkfield *v.* Packington, 2 C. & P. 599.

3 Myall *v.* R. Co., 19 N. H. 122; Reynolds *v.* Toppan, 15 Mass. 370; Goodrich *v.* Thompson, 4 Rob. 75; 44 N. Y. 324; Goddard *v.* Mallory, 52 Barb. 87; Balt. etc. Steam. Co. *v.* Brown, 54 Pa. St. 77; Strohn *v.* R. Co., 23 Wis. 126; Deming *v.* R. Co., 48 N. H. 455; Burnham *v.* R. Co., 63 Me. 298; Lackawanna etc. R. Co. *v.* Cheneweth, 52 Pa. St. 382; Hanson *v.* R. Co., 41 N. W. Rep. 529; Wood *v.* R. Co., 68 Ia. 491; Baker *v.* R. Co., 91 Mo. 153; Harrison *v.* R. Co., 74 Mo. 364; Easton *v.* Dooley, 14 S. W. Rep. 583; Isaacson *v.* R. Co., 94 N. Y. 278. But see White *v.* R. Co., 19 Mo. (App.) 400; Turner *v.* R. Co., 20 Mo. (App.) 632; Clourd. *v.* R. Co., 14 Mo. App. 136; Grover etc. Co. *v.* R. Co., 70 Mo. 672; 35 Am. Rep. 444; Riley *v.* R. Co., 34 Hun. 97; Elkins *v.* R. Co., 23 N. H. 275; Burroughs *v.* R. Co., 100 Mass. 26; Crenshawe *v.* Pearce, 37 Fed. Rep. 432; Law *v.* Botsford, 26 Fed. Rep. 651; Haggerty *v.* R. Co., 59 Mich. 366; Mo. Pac. R. Co. *v.* Stults, 21 Kas. 752. Where a freight agent issues bills of lading when no goods were delivered the carrier is not liable. Robinson *v.* R. Co., 9 Fed. Rep. 129; 16 Fed. Rep. 57; Balt. etc. R. Co. *v.* Wilkens, 42 Md. 11; *Contra* Brooke *v.* R. Co., 2 East. Rep. 125; Bk. of Baldwin *v.* R. Co., 106 N. Y. 195; Nat. Bk. *v.* R. Co., 46 N. W. Rep. 342.

4 Lawson Usages and Customs, sec. 79; Ford *v.* Mitchell, 21 Ind. 54; Leigh *v.* Smith, 1 Car. & P. 638; Blanchard *v.* Isaacs, 3 Barb. 388; Merriam *v.* R. Co., 20 Conn. 354; 52 Am. Dec. 344; Converse *v.* Norwich etc. Trans. Co., 33 Conn. 166; Green *v.* R. R. Co., 38 Iowa, 100; 40 Iowa, 410; Wright *v.* Caldwell, 3 Mich. 51; Packard *v.* Getman, 6 Cow. 759; O'Bannon *v.* Southern Exp. Co., 51 Ala. 481; Illinois Cent. R. R. Co. *v.* Smyser, 38 Ill. 354; 87 Am. Dec. 301; Freeman *v.* Newton, 3 E. D. Smith, 246; Hickox *v.* R. R. Co., 31 Conn. 281; 83 Am. Dec. 143; Cobban *v.* Downe, 5 Esp. 41.

5 Cobban *v.* Downe, 5 Esp. 41; Barwell *v.* North, 2 C. & H. 679; Blanchard *v.* Isaacs, 3 Barb. 87.

6 Merriam *v.* R. Co., 20 Conn. 354; 52 Am. Dec. 344; Converse *v.* Norwich etc. Trans. Co., 33 Conn. 166.

7 Green *v.* R. Co., 38 Ia. 100; 41 Ia. 410.

the delivery must have been in strict accordance with the usage.[1]

§ 117. **Common Carrier a Bailee for Hire.**—A common carrier of goods is a bailee; and like other bailees for hire, a common carrier, is bound to the exercise of that care and diligence which are usually bestowed by men of ordinary prudence in the management of their own affairs, and he is liable for any want of skill in his calling. In these respects, the common carrier differs not from other bailees for hire.[2]

§ 118. **Common Carrier Likewise an Insurer.**—In addition to this general liability, the common carrier is regarded as an insurer of the property intrusted to him. His insurance differs from other forms of insurance in the following respects: First. When goods in the hands of a carrier have been lost, he can not sue an insurance company which had insured them for the owner for contribution.[3] In such case the liability of the carrier is primary, and that of the underwriter is only secondary.[4] Second. His insurance is always connected with the custody of the goods.[5] Third. In

[1] Thus a usage to deliver goods to the mate of a ship will not make good a mere leaving them on the wharf near the ship. Leigh *v.* Smith, 1 Car. & P. 638. A usage that a passenger by boat delivers his trunk to the boat by placing it on board will not include the delivery of a trunk in that way by one not a passenger. Wright *v.* Caldwell, 3 Mich. 51. So, where the custom makes the placing of goods on the dock near the boat and notice to the carrier a sufficient delivery to him, if more articles are placed on the wharf than the carrier is notified of, he will not be answerable for the excess. Packard *v.* Getman, 6 Cow, 757.

[2] Ang. Carr., § 67; Browne Carr., § 12.

[3] Gailes *v.* Hailman, 11 Pa. St. 515. The carrier may by contract with the shipper have the benefit of any insurance the shipper may have effected upon them. Mercantile Ins. Co. *v.* Calebs, 20 N. Y. 173; Rentoul *v.* R. Co., 17 Fed. Rep. 903; Jackson *v.* Ins. Co., 139 Mass. 508; 82 Am. Rep. 728. Such an agreement does not violate a statute forbidding the carrier to limit his liability. British etc. Ins. Co. *v.* R. Co., 63 Tex. 475; 51 Am. Rep. 661.

[4] Hall *v.* R. Co., 13 Wall. 367; Hart *v.* Western R. Co., 13 Metc. 99. A common carrier who has brought suit against a wrong-doer to recover for the destruction of goods which had been entrusted to him for transportation, and has recovered for their amount, is liable to the owner of the goods for the sum recovered, and cannot recoup against the claim the expenses incurred in the litigation with the wrong-doer. Hardman *v.* Brett, 37 Fed. Rep. 803.

[5] Gailes *v.* Hailman, *supra.*

the absence of contract, the immemorial common law of England makes certain exceptions from the risks assumed by the carrier, which are not implied in other forms of insurance. Fourth. The insurance of the carrier results from the law applied to a particular relationship, and not from a special contract to insure.[1]

§ 119. **Exceptions to his Liability as Insurer.**— Generally, the common carrier is liable for losses proceeding from causes which are wholly beyond his control, and which he could neither provide against nor foresee. But he is not liable for any loss or damage to goods in his hands caused wholly either by the act of God or the "king's enemies," that is, the public enemy. It is said that the reason for these exceptions is that the causes of loss thus excepted are so notorious that they are easily proved or disproved.[2] Other causes of loss might, however, be equally notorious; and other reasons for the exceptions might be suggested. The difficulty of compensating the tremendous losses growing out of public war is sufficiently obvious; and it is known that, in an earlier age, losses caused by lightning, tempest, earthquake, or any other of the more appalling phenomena of Nature, were regarded as the judgments of Heaven, which should be

[1] "His second responsibility, which arises upon reasons of policy, is, that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy, it would be without reason; many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers because when the common law adopted that policy, the business of common carriers in England was exercised in a particular manner and subject to particular conditions which called for the adoption of that policy." Brett, J., in Nugent *v.* Smith, L. R. 1 C. P. D. 19, 423.

[2] Lord Holt in Coggs *v.* Bernard, 2 Ld. Raym. 909; Best, C. J., in Riley *v.* Horne, 5 Bing. 217; Forward *v.* Pittard, 1 Term. Rep. 27; Thomas *v.* R. Co., 10 Metc. 472; Spencer, J., in Roberts *v.* Turner, 12 Johns. 232; Hollister *v.* Nowlen, 19 Wend. 234; Elkins *v.* R. Co., 23 N. H. 275; Moses *v.* R. Co., 24 N. H. 71; Rixford *v.* Smith, 52 N. H. 355.

allowed to rest where they fell.[1] At the present time, the action of the Deity is as much recognized in the most quiet operation of nature as in the most violent; but it is important to be remembered that in the law of carriers, the phrase "the act of God" remains true to its original meaning.

The maxim that common carriers are liable for all losses excepting those caused by the act of God or by the public enemy, is convenient enough for common use; but on a closer examination it will be found to be inaccurate, and, hence, to some extent, misleading.[2] More correctly, it may be said, that the carrier is not liable: First. For losses caused by the act of God. Second. Losses caused by the public enemy. Third. Losses caused by the inherent defect, quality, or vice of the thing carried. Fourth. Losses caused by the seizure of goods or chattels in his hands, under legal process. Fifth. Losses caused by some act or omission of the owner of the goods.

With these exceptions the liability of the carrier is unconditional. To hold, otherwise, it is said, would be to afford opportunities for collusion between carriers and robbers or thieves, and to open a way for false pretences on the part of carriers which could not be disproved.[3]

§ 120. **"The Act of God."**—In a late English case Mr. Justice Brett said: "The definition to be extracted from all the cases is said to be given in a note on *Coggs* v. *Bernard*, in the American edition (by Mr. Wallace), of Smith's Leading Cases. The best form of the defini-

[1] "Let us take the case of the Christian thinker some centuries back. His creed being that the Deity created and ordained all things, nevertheless, when he burnt his finger, the cause of the burn he attributed to the fire, and not to God; but when the thunder muttered in the sky, he attributed that to no cause but God." Lewes' Hist. Philos., vol, I. p. 123.

[2] See Hall *v.* Renfro, 3 Metc. (Ky.) 51.

[3] See cases cited, *post.*

tion seems to us to be that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of Nature as the defendant (carrier) could not by any amount of ability foresee would happen; or, if he could foresee that it would happen, could not by any amount of care and skill resist so as to prevent its effect."[1] This definition is susceptible of being misunderstood. The phrases "any amount of ability," and "any amount of care and diligence," might be supposed to erect a standard so high that few could reach it, and which no one could transcend. It is, perhaps, needless to say that the law does not exact from all men, of any class, qualities which are so rare as to be almost unknown. We have seen that the law requires only reasonable skill and reasonable diligence; but these are rigidly demanded.[2] Of course, the exact measure of the skill and diligence required can be determined only by the degree of the delicacy and importance of the duties assumed in each particular case. With this explanation, the definition thus given may be accepted as being a correct exposition of the law both in England and America.

In order to excuse the carrier, the act of Nature must have been violent; such as lightning,[3] tempest,[4] or earthquake,[5] or an extraordinary flood.[6] The driving of a boat against a bridge-pier by a sudden gust of

1 Nugent *v.* Smith, L. R. 1 C. P. Div. 19 (1875); 15 Eng. Rep., Moak's Notes, 203; *s. c.*, 1 C. P. Div. 423.

2 *Ante*, § 11; Edwards on Bail., § 454. The definition given by Mr. Wallace is substantially similar to that given by Brett, J. 1 Smith's Ld. Cas. 315. See, also, Klauber *v.* American Express Co., 21 Wis. 21; Friend *v.* Woods, 6 Gratt. 189.

3 Forward *v.* Pittard, 1 Term Rep. 27.

4 Gillett *v.* Ellis, 11 Ill. 579.

5 Slater *v.* R. Co., 6 S. E. Rep. 936.

6 Read *v.* Spaulding, 5 Bosw. 395; Nashville etc. R. Co. *v.* David, 6 Heisk. 261; Wallace *v.* Clayton, 42 Ga. 443; Lovering *v.* Buck Mountain Coal Co., 54 Pa. St. 291; Lamont *v.* Nashville etc. R. Co., 9 Heisk. 58. A flood in a river over which a railroad crosses is the act of God. Norris *v.* R. Co., 23 Fla. 182; Davis *v.* R. Co., 13 Mo. (App.) 449; 89 Mo. 340; Nashville etc. R. Co. *v.* David, 6 Heisk. 261; 19 Am. Rep. 594.

wind,[1] the freezing of navigable waters,[2] a snow-storm which blocks up a railway,[3] or the freezing of fruit trees which are being transported,[4] have all been regarded as cases falling within this exception. So have a high wind, strong enough to blow heavy goods from an open car,[5] and the sliding of a natural hill upon a railroad track.[6]

§ 121. **Discordant Decisions.**—Sir William Jones piously objected to the use of the phrase "the act of God," as being irreverent, and proposed to put that of "inevitable accident" in its stead, intending, apparently, to give the same restricted meaning to the latter phrase as had been given to the former.[7] Some of the courts have been misled by this suggestion; and have supposed that a common carrier is not liable for any loss which he could not foresee or prevent, excepting, it would seem, all losses caused directly by human means—as by thieves and robbers.[8] In some of the cases, the phrase "the act of God" has been used so vaguely that it is not easy to ascertain that any precise meaning was attached to it.[9] Other cases are more explicit, without being more satisfactory. Thus, in Connecticut, it was held that the loss of a vessel by running on a rock not generally known, and not known to the master, was, *prima facie*, a loss by the act of God. The decision was unnecessary, as the bill of lading contained an exception of all losses by "dangers of the

1 Germania Ins. Co. *v.* The Lady Pike, 17 Am. Law. Rep. 614.

2 Parsons *v.* Hardy, 14 Wend. 215; Harris *v.* Rand, 4 N. H. 259; Wallace *v.* Vigus, 4 Blackf. 260; West *v.* The Berlin, 3 Iowa 532; The Maggie Hammond, 9 Wall. 435; Worth *v.* Edmonds, 52 Barb. 40.

3 Ballentine *v.* R. Co., 40 Mo. 491.

4 Vail *v.* R. Co., 63 Mo. 230.

5 Miltimore *v.* R. Co., 37 Wis. 190.

6 Gleeson *v.* R. R. Co., 5 Mackey, 356.

7 Jones Bail., §§ 104, 105.

8 Neal *v.* Saunderson, 2 S. & M. 572; Walpole *v.* Bridges, 5 Blackf. 222.

9 Robertson *v.* Kennedy, 2 Dana, 430; Sprowl *v.* Kellar, 4 Stew. & P. 582; Fish *v.* Chapman, 2 Ga. 349; overruled in Central Line *v.* Lowe, 50 Ga. 509; Lewis *v.* Ludwick, 6 Coldw. 368.

sea."[1] But in a later case, the same court held that this latter exception did not vary the common-law liability of the carrier.[2] So, it has been held that the sinking of a boat by a snag, without negligence, is within the exception of the act of God.[3] In South Carolina, it was held, in an early case, that carriers *by water*, were not liable for accidents against which ordinary foresight, care, skill and diligence could not provide.[4] Of this curious case, the same court afterwards said that "it was fortunately forgotten in the long sleep of thirty-two years before publication,"[5] during which time it had been unconsciously overruled.[6] In Pennsylvania it was held that any misfortune or accident that could not be averted by the skill and prudence of the carrier was within this exception.[7] In Indiana, there is an intimation of the same kind.[8] In Delaware, it was held that if a vessel strike on a rock not hitherto known, and not laid down on any chart, the master is not liable.[9] In one case, the court held that, in order for the act of Nature to fall within the exception of the act of God, it need not be violent—as where a vessel was caused to drift against the shore by a sudden lull in the wind.[10] The court was misled into using the conceptions and language of theology, in place of those of the law. These discord-

1 Williams *v.* Grant, 1 Conn. 487.

2 Crosby *v.* Fitch, 12 Conn. 410. But in Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, a plain distinction was made between the act of God and inevitable accident.

3 Faulkner *v.* Wright, Rice 107. There is a *dictum* of a similar import in Moses *v.* Norris, 4 N. H. 304, but it is overruled by Hall *v.* Cheney, 36 N. H. 26, and Hackett *v.* R. Co., 35 N. H. 390.

4 Everleigh *v.* Sylvester, 2 Brev. 178.

5 McClenaghan *v.* Brock, 5 Rich. 17.

6 Harrington *v.* Lyles, 2 Nott. & M. 88. Yet its authority was seemingly recognized in Steamboat Co. *v.* Bason, Harp. 262 (1824). But it was dissented from in Patton *v.* Magrath, Dudley, 159, and was distinctly overruled in McClenaghan *v.* Brock, *supra*, which probably overrules Smyrl *v.* Niolon, 2 Bailey, 421.

7 See a long and loose opinion to this effect, by Lowrie, C. J., in Hays *v.* Kennedy, 41 Pa. St. 378.

8 Walpole *v.* Bridges, 5 Blackf. 222, and see Seligman *v.* Amijo, 1 N. Mex. 459.

9 Pennewill *v.* Cullen, 5 Harr. 238.

10 Colt *v.* McMechen, 6 Johns. 160; 5 Am. Dec. 200.

ant decisions have been often criticised and condemned.[1] It may be remarked of them that they are for the most part, not recent, and that all of them, with one exception,[2] relate to carriers by water—dimly foreshadowing the statutory relaxations that have been made in favor of that class of carriers in the general interest of commerce, and because goods sent by water are more commonly insured than those sent by land; as carriers of the former class frequently lose all their means for paying for any loss to goods intrusted to them, by the same accident by which that loss occurs.[3]

§ 122. **Cases Not Within the "Act of God."**—A loss from fire (not caused by lightning,[4]) or by the bursting of the boiler of a steamer,[5] or by heat,[6] or by an unseen obstruction in navigation,[7] or by collision not caused by tempest,[8] or by the burning of a ship by the bursting of a cask of chloride of lime, though such an occurrence had never been previously known,[9] or by the sinking of a vessel by running on a piece of timber

1 Per Le Grand, J., in Fergusson *v.* Brent, 12 Md. 9; Parsons *v.* Monteath, 13 Barb. 353; Central Line *v.* Lowe, 50 Ga. 509. Note of Mr. Wallace to Coggs *v.* Bernard, 1 Smith's Ld. Cas. 315.

2 Walpole *v.* Bridges, *supra.*

3 The statutory restrictions on the liabilities of carriers by water are contained in U. S. Rev. Stats. §§ 4282-4289; see Wheeler Carr. Caps II, III. For a sketch of the history of statutes of this kind, see Norwich etc. Trans Co. *v.* Wright, 13 Wall. 104.

4 Thorogood *v.* Marsh, 1 Gow, N. P. C. 105; Forward *v.* Pittard, 1 Term. Rep. 27; Hyde *v.* Trent Navigation Co., 5 Term. Rep. 389; Moore *v.* R. Co., 3 Mich. 23; Cox *v.* Peterson, 30 Ala. 608; Chevallier *v.* Straham, 2 Tex. 115; Miller *v.* Steam Navigation Co., 10 N. Y. 431; Parsons *v.* Monteath, 13 Barb. 353; Hall *v.* Cheney, 36 N. H. 26; Patton *v.* Magrath, Dud. (S. C.) 159; 31 Am. Dec. 552; Gilmore *v.* Carman, 1 Smedes & M. 279; 40 Am. Dec. 96. The great fire of Chicago not the "act of God" Chicago etc. R. R. Co. *v.* Sawyer, 69 Ill. 285; 18 Am. Rep. 613. *Contra*, Hunt *v.* Morris, 6 Mart. (La.) 676; 12 Am. Dec. 489.

5 McCall *v.* Brock, 5 Strobh. 119; Navigation Co. *v.* Dwyer, 29 Tex. 376; Bulkley *v.* Naumkeag Cotton Co., 24 How. 386; The Edwin, 1 Sprague, 477; The Mohawk, 8 Wall. 153.

6 Beard *v.* R. Co., 44 N. W. Rep. 800.

7 Brousseau *v.* The Hudson, 11 La. An. 427; Smyrl *v.* Niolon, 2 Bail. 421; 23 Am. Dec. 146; Steele *v.* Taylor, 31 Ala. 667; 70 Am. Dec. 516.

8 Plaisted *v.* Boston Steam Navigation Co, 27 Me. 132; Mershon *v.* Hobensack, 22 N. J. (Law) 372.

9 Brousseau *v.* The Hudson, *supra.*

not visible in ordinary tides,[1] or by the stranding of a vessel on a newly-formed and previously unknown bar in a river,[2] or by the shifting of a buoy,[3] have all been held as not falling within this exception, though in each case the carrier was without fault.

§ 123. **Question of Negligence Immaterial.**— The question of negligence is wholly irrelevant; for, if the loss does not fall within an exception recognized by law, the carrier is responsible for it, although he exercised every possible diligence to prevent it.[4] This is only to say that the carrier is an insurer.

§ 124. **"Act of God" Must be Exclusive Cause.**— The loss must be caused directly and exclusively by the act of God, or else the carrier will be liable.[5] If divers

1 New Brunswick Steam Navigation Co. *v.* Tiers, 24 N. J. (L.) 697.

2 Friend *v.* Woods, 6 Gratt. 189.

3 Reaves *v.* Waterman, 2 Spears, 197, Evans and Wardlaw, JJ., dissenting.

4 Trent Navigation Co. *v.* Wood, 4 Dougl. 287; 3 Esp. 131; Siordet *v.* Hall, 4 Bing. 607; Clark *v.* Barnwell, 12 How. 272; Ewart *v.* Street, 2 Bailey 157; King *v.* Shepherd, 3 Story 349; Agnew *v.* The Contra Costa, 27 Cal. 425; Stephens etc. Trans. Co. *v.* Tuckerman, 33 N. J. 543; Chevallier *v.* Straham, 2 Tex. 115; Albright *v.* Penn, 14 Tex. 290; Parsons *v.* Monteath, 13 Barb. 353; McHenry *v.* R. Co., 4 Harr. 448; Hays *v.* Kennedy, 41 Pa. St. 378; Merritt *v.* Earle, 31 Barb. 38; Merritt *v.* Earle, 29 N. Y. 115; Forward *v.* Pittard, 1 Term Rep. 27; Mershon *v.* Hobensack, 22 N. J. 372; Backhouse *v.* Sneed, 1 Murph. 173; Eagle *v.* White, 6 Whart. 505; 37 Am. Dec. 434; Davis *v.* Wabash etc. R. Co., 89 Mo. 340; Schieffelin *v.* Harvey, 6 Johns 170; 5 Am. Dec. 206; Craig *v.* Childress, Peck. 170; 14 Am. Dec. 751; Daggett *v.* Shaw, 3 Mo. 264; 25 Am. Dec. 439; Robertson *v.* Kennedy, 2 Dana 43; 26 Am. Dec. 466; Parsons *v.* Hardy, 14 Wend. 215; 28 Am. Dec. 521; Gilmore *v.* Corman, 1 Smedes & M. 279; 40 Am. Dec. 97; Neal *v.* Saunderson, 2 Smedes & M. 572; 41 Am. Dec. 609; Lewis *v.* Ludwick, Cold. 368; 98 Am. Dec. 454; Parker *v.* Flagg, 26 Me. 181; 45 Am. Dec. 101; Fish *v.* Chapman, 2 Ga. 349; 46 Am. Dec. 393; Norway Plains Co. *v.* R. R. Co., 1 Gray, 263; 61 Am. Dec. 423; New Brunswick Steam. Co. *v.* Tiers, 24 N. J. L. 697; 64 Am. Dec. 395; Cox *v.* Peterson, 30 Ala. 608; 68 Am. Dec. 145; Ferguson *v.* Brent, 12 Md. 5; 71 Am. Dec. 582; Bohannan *v.* Hammond, 42 Cal. 227; Welsh *v.* R. R. Co., 10 Ohio St. 65; 75 Am. Dec. 490; Bennett *v.* Byram, 38 Miss. 17; 75 Am. Dec. 90; Arnold *v.* Jones, 26 Tex. 335; 82 Am. Dec. 617; Hooper *v.* Wells, 27 Cal. 11; 85 Am. Dec. 211; Bland *v.* Adams Exp. Co., 1 Duvall, 232; 85 Am. Dec. 623; Read *v.* Spaulding, 30 N. Y. 630; 86 Am. Dec. 426; Michaels *v.* R. R. Co., 30 N. Y. 564; 86 Am. Dec. 415; Southern Exp. Co. *v.* Newby, 36 Ga. 635; 91 Am. Dec. 783; Mobile etc. R. R. Co. *v.* Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Wolf *v.* Am. Exp. Co., 43 Mo. 421; 97 Am. Dec. 407; Buckland *v.* Ad. Ex. Co., 97 Mass. 124; 93 Am. Dec. 18.

5 Sprowl *v.* Kellar, 4 Stew. & P. 382; Ewart *v.* Street, 2 Bailey 157; King *v.* Shepherd, 3 Story, 249; Abb. on Shipp. 315; Michaels *v.* R. Co., 30 N. Y. 564; 86 Am. Dec. 415.

causes concur in the loss, the act of God being one, but not the immediate or proximate cause, the carrier is not discharged;[1] as, where a vessel grounds in a storm, the officers and crew being misled by the absence of a customary light, and the presence of a misguiding light.[2] So the carrier is not excused from liability for a loss by the act of God operating upon an unseaworthy vessel, when such act would have proved harmless to a seaworthy vessel.[3] A carrier is responsible for injuries to perishable goods by cold, where due care, in view of all the circumstances, was not taken to protect them.[4] Non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.[5]

§ 125. **Negligence and Act of God Concurring.**— Where the loss is caused partly by negligence and partly by the act of God, the carrier is liable;[6] as where a master of a vessel fills her boilers over night to be ready for starting in the morning, and a pipe freezes

[1] New Brunswick Steamboat Co. *v.* Tiers, 24 N. J. (L.) 697.

[2] McArthur *v.* Sears, 21 Wend. 190.

[3] Packard *v.* Taylor, 35 Ark. 402; 37 Am. Rep. 37.

[4] Wing *v.* R. Co., 1 Hilt, 235.

[5] Williams *v.* Vanderbilt, 38 N. Y. 217; 84 Am. Dec. 334.

[6] Lyon *v.* Mells, 5 East. 428; Davis *v.* Garrett, 3 Bing. 716; Birkett *v.* Willan, 2 B. & Ald. 356; Bodenham & Bennett, 4 Price 31; Smith *v.* Horne, 2 Moore 18; Powell *v.* Layton, 2 Bos. & Pull. (N. R.) 355; Nordet *v.* Hall, 4 Bing. 607; Muddle *v.* Stride, 9 C. & P. 380; Lowe *v.* Booth, 13 Price, 329; Beckford *v.* Crutwell, 5 C. & P. 242; Cailiff *v.* Danvres, 1 Peake 155; Hunter *v.* Potts, 4 Camp. 203; Oakley *v.* Steam Packet Co., 11 Ex. 618; Laveroni *v.* Drury, 8 Ex. 166; Hollingworth *v.* Brodrick, 7 Ad. & E. 40; Dibble *v.* Morgan, 1 Woods, 406; Elliott *v.* Rossell, 10 Johns. 1; Armentrout *v.* St. Louis etc. R. Co., 1 Mo. (App.) 158; Pruitt *v.* Hannibal etc. R. Co., 62 Mo. 527; Davis *v.* R. Co., 89 Mo. 340. A carrier failed to deliver promptly certain fruit trees because of high water, rendering a part of its line impassable, whereby the trees were when received dead; but he did not show that he could not have sent them over another line. *Held*, that the loss was not occasioned by the act of God, and the carrier was liable therefor. Chicago etc. R. Co. *v.* Manning, 37 N. W. Rep. 462 (Neb.). Where, from the plaintiff's own evidence, it appears that the act of God caused the injury to the goods, the carrier is exonerated from liability, unless plaintiff shows the carrier was guilty of some specific negligence which co-operated to produce the loss. Davis *v.* R. Co., 89 Mo. 340.

and bursts in the night, though it was customary to fill the boilers of outgoing vessels over night;[1] or where he has been guilty of any previous misconduct by which the goods in his charge are exposed to the act of God, and are injured thereby.[2] It is negligence for a ferryman to start across a river when a dangerous wind is blowing,[3] or for a wagoner to start across a stream with an insufficient team;[4] and a loss subsequently occurring by reason of the wind, or the sudden rising of the stream, will not be excused. But where there is a loss by the act of God, the carrier will not be held liable on a showing that there was a defect in his vessel, or a want of skill on his part; it must also be made to appear that this defect or want of skill contributed to the loss.[5]

§ 126. **Loss by Act of God After Delay.**—Where there is a loss by the act of God after a negligent delay by the carrier, the cases are not uniform as to the liability of the carrier. Mr. Browne says:[6] "So, if he (the carrier), delays an unreasonably long time on the journey, and it is proved that but for such unreasonable waste of time he would have been able to deposit his goods in safety, it will not be a good defense to an action for the amount of injury done to the goods of an owner, who entrusted them to him to be carried, to say that the injury was caused by a flood, which was the act of God." This doctrine is followed in New

1 Siordet *v.* Hall, 4 Bing. 607.

2 Hart *v.* Allen, 2 Watts 115; Williams *v.* Grant, 1 Conn. 487; Morgan *v.* Dibble, 29 Tex. 107; Chevallier *v.* Straham, 2 Tex. 115; Klauber *v.* Am. Ex. Co., 21 Wis. 21; Cook *v.* Gourdin, 2 Nott. & M. 19.

3 Cook *v.* Gourdin, *supra.*

4 Loomis *v.* Pearson, Harp. 470. A carrier attempted to cross a fording-place in a creek, between sunset and dark, while a shower was approaching, without examining the state of the ford, and the wheels of his wagon stuck fast, and the water rose with extraordinary suddenness, so as to injure the goods in the wagon. *Held*, that he was liable for the damage thus caused. Campbell *v.* Morse, Harp. 468.

5 Hart *v.* Allen, 2 Watts 115, overruling Bell *v.* Reed, 4 Binn. 127; New Brunswick Steam Navigation Co. *v.* Tiers, 24 N. J. (L.) 697.

6 Browne Carr. § 98.

York and other States.[1] But it is held by the Supreme Court of the United States, and in Pennsylvania, Massachusetts and Nebraska, that in such case the negligence of the carrier is not the proximate cause of the loss and that he is not answerable for it.[2]

§ 127. **Loss by Act of God After Deviation.**—Deviation is the voluntary departure from the voyage or route without necessity or reasonable cause.[3] Necessity can alone sanction it in any case, and then it must be strictly commensurate with the *vis major* producing it.[4] If a master deviates from the usual course of his voyage, and damage is caused by a tempest, in itself the act of God, the proximate cause of the loss is the wrongful act of the master, and he is responsible for it.[5] The same rule applies to carriers by land.[6] If a carrier has agreed to send goods by land, and he sends them by water,[7] or, if he has agreed to carry them by

1 Read *v.* Spaulding, 30 N. Y. 630, dissenting from Morrison *v.* Davis, 20 Pa. St. 171; Denison *v.* R. Co., 3 Lans. 265; Michaels *v.* R. Co., 30 N. Y. 564; 86 Am. Dec. 415; Hewitt *v.* R. Co., 63 Ia. 611; McGraw *v.* R. Co., 18 W. Va. 361; 41 Am. Rep. 696.

2 Morrison *v.* Davis, *supra*; Railroad Co. *v.* Reeves, 10 Wall. 176; Denny *v.* R. Co., 13 Gray, 481; Hoadley *v.* Northern Trans. Co., 115 Mass. 304; McClary *v.* R. Co., 3 Neb. 44. See Mich. etc. R. Co. *v.* Burrows, 33 Mich. 6.

3 Bond *v.* The Cora, 2 Pet. Adm. 373; Maryland Insurance Co. *v.* Le Roy, 7 Cranch, 26; Hand *v.* Baynes, 4 Whart. 204; 33 Am. Dec. 54; Le Sage *v.* R. R. Co., 1 Daly, 306; Ackley *v.* Kellogg, 8 Cow. 223; Powers *v.* Davenport, 7 Blackf. 497; 43 Am. Dec. 100; Souter *v.* Baymore, 7 Pa. St. 415; 47 Am. Dec. 518; Sager *v.* R. R. Co., 31 Me. 228; 50 Am. Dec. 659; Phillips *v.* Brigham, 26 Ga. 617; 71 Am. Dec. 227; Bennett *v.* Byram, 38 Miss. 17; 75 Am. Dec. 90. A common carrier received goods at Worcester, Massachusetts, to transport to the consignees, at Mattoon, Illinois, and carried them by way of Chicago, instead of the most usual and direct route, by way of Indianapolis; and while stored in Chicago awaiting a reshipment, they were destroyed by the great fire of 1871. *Held*, that the carrier was not excused from liability on the ground of inevitable accident, as there was no compulsion to take the goods through Chicago. Merchants' etc. Trans. Co. *v.* Kahn, 76 Ill. 520.

4 Maryland Ins. Co. *v.* Le Roy, 7 Cranch, 26.

5 See opinion of Tindall, C. J., in Davis *v.* Garrett, 6 Bing. 716; Ang. on Car., §§ 203-4; Story on Bail., § 413; Powers *v.* Davenport, 7 Blackf. 496; 43 Am. Dec. 100; Philips *v.* Brigham, 26 Ga. 617; 71 Am. Dec. 227; Lawrence *v.* McGregor, Wright, 193.

6 Powers *v.* Davenport, 7 Blackf. 496; Lawrence *v.* McGregor, Wright, 193; Phillips *v.* Brigham, 26 Ga. 617.

7 Ingalls *v.* Brooks, Ed. Sel. Cas. 104.

canal, and he takes them out to sea,[1] and they are lost by the act of God, he is liable. So, if he agrees to send them by one line of boats, and sends them by another,[2] or if he agrees to send them by steam and he sends them by sail.[3] The burden of showing a necessity for a deviation rests upon the carrier;[4] and the necessity must be real, and not merely apparent.[5] If the deviation is only for the convenience of the carrier, he assumes the risk of any loss that may occur, and becomes an insurer at all events.[6] But it is the duty of the carrier, in an unforeseen emergency, when the safety of the goods requires it, and when the consent of the owner may fairly be presumed, to deviate from the letter of his instructions, and, if possible, to notify the owner of such deviation.[7] If a carrier has agreed to send goods by a particular line of boats, and the owner of the boats refuses to receive them, the carrier should advise the owner of the goods of that fact, depositing them in a warehouse if need be, and should wait for further instructions.[8] And a carrier is bound to follow the instructions of his employer as to the selection of carriers beyond his own route.[9] It has been said that if a loss occurs after a deviation, and the carrier can show that a loss must have certainly occurred had there been no deviation, the carrier shall be excused;[10] but it is difficult to see how such proof could be possible.

§ 128. **Duty of Carrier to Preserve Goods Damaged by Act of God.**—Where the loss sustained by

1 Hand *v.* Baynes, 4 Whart. 204.

2 Johnson *v.* New York Cent. R. Co., 33 N. Y. 610; Cox *v.* Foscue, 37 Ala. 505; 79 Am. Dec. 69.

3 Wilcox *v.* Parmlee, 3 Sandf. 610.

4 Le Sage *v.* R. Co., 1 Daly, 306; Ackley *v.* Kellogg, 8 Cow. 223.

5 Hand *v.* Baynes, *supra.*

6 Johnson *v.* R. Co., 33 N. Y. 610, reversing *s. c.*, 31 Barb. 196; Sager *v.* R. Co., 31 Me. 228.

7 *Ibid.*

8 *Ibid.*; Fisk *v.* Newton, 1 Denio, 45; Story on Bail., sec. 543; Goodrich *v.* Thompson, 44 N. Y. 324.

9 Johnson *v.* R. Co., 33 N. Y. 610.

10 Maghee *v.* Camden etc. R. Co., 45 N. Y. 514.

the act of God is not a total one, it is the duty of the carrier to preserve such portions of the goods as may still possess some commercial value.[1] And he must show that he afterwards delivered them to the consignee without any further damage,[2] or that he has used, actively and energetically, such means to save them as prudent and skillful men engaged in his business might fairly be expected to use under like circumstances.[3] Thus, for illustration, if goods are wet during a storm, the carrier must open them and dry them;[4] or if his vessel is wholly disabled, he must use his utmost exertions to transport or send the goods forward to the port of delivery, even though he have to hire another vessel for that purpose.[5] In any event, the carrier will always be answerable for that amount of the damage which is the result of his own want of diligence.[6]

§ 129. **The Public Enemy.**—Common carriers are not responsible for losses caused by the public enemy. Public enemies are those with whom the Nation or State is at open war, and pirates on the high seas.[7] A loss by thieves or robbers,[8] or by embezzlement,[9] or by rioters or insurgents,[10] is not within the exception, unless the insurrection assumes the magnitude of an international war, as was the case in the late civil war

1 Craig *v.* Childress, Peck, 270.

2 Day *v.* Ridley, 16 Vt. 48.

3 Railroad Co. *v.* Reeves, 10 Wall. 176; Nashville etc. R. Co. *v.* David, 6 Heisk. 261.

4 Chouteaux *v.* Leech, 18 Pa. St. 224.

5 The Maggie Hammond, 9 Wall. 435.

6 Faulkner *v.* Wright, Rice, 107.

7 Chitty on Car., 37; Jeremy on Car., 34; Story on Bail., §§ 512, 526; Ang. on Car., § 200; Kent's Com. 216, 299. A force of United States soldiers under command of an army officer is not within the phrase. Seligman *v.* Armijo, 1 N. Mex. 459.

8 Coggs *v.* Bernard, 2 Ld. Ray. 909; Ang. on Car., § 200; Boon *v.* The Belfast, 40 Ala. 184; Hall *v.* Cheney, 36 N. H. 26; The Belfast *v.* Boon, 41 Ala. 50; Lewis *v.* Ludwick, 6 Coldw. 368; 98 Am. Dec. 454.

9 Schieffelin *v.* Harvey, 6 Johns. 170; Watkinson *v.* Laughton, 8 Johns. 213; Lewis *v.* Ludwick, 6 Coldw. 386.

10 Coggs *v.* Bernard, *supra;* Forward *v.* Pittard, 1 Term. Rep. 27; Missouri Pac. R. Co. *v.* Nevill, 30 S. W. Rep. 425 (Ark.).

in this country.[1] Robbery on a river where the tide ebbs and flows, is not a loss from the public enemy, though an act of Congress may have provided that such a robbery shall be deemed piracy.[2] The "king's enemies" include the enemies of the sovereign of the person executing the bill of lading.[3]

But "though the public enemy be in itself a good defense, yet if the loss be directly brought about by reason of the negligence or want of proper care and foresight of the party himself, it will not excuse him."[4]

§ 130. **Losses Caused by Inherent Defects in Goods Carried.**—Carriers are not liable for losses arising from the ordinary wear and tear of goods in the course of transportation, nor for their ordinary deterioration in quantity or quality, nor for their inherent natural infirmity or tendency to damage; and this rule includes the decay of fruits, the diminution, leakage or evaporation of liquids, and the spontaneous combustion of goods. In all such cases, where the negligence or wrongful act of the carrier does not co-operate in the loss, he will be excused.[5] This exception also includes all injuries done by living animals to themselves and to each other; losses that are caused by

1 Hubbard *v.* Harnden Express Co., 10 R. I. 251; Smith *v.* Brazelton, 1 Heisk. 44; Lewis *v.* Ludwick, *supra;* Bland *v.* Exp. Co., 1 Duvall, 32; 85 Am. Dec. 623; See Nashville etc. R. Co. *v.* Estis, 7 Heisk. 622.

2 The Belfast *v.* Boon, 41 Ala. 50.

3 Russell *v.* Nieman, 17 C. B., N. S. 160.

4 Clarke *v.* R. Co., 39 Mo. 184; 90 Am. Dec. 458; Amies *v.* Stevens, 1 Strange, 128; Forward *v.* Pittard, *supra;* Parker *v.* James, 4 Camp. 112.

5 Story Bail., § 492 *a;* 3 Kent's Com. 299-301; Hastings *v.* Pepper, 11 Pick. 41; Chitty Carr. 44; Browne Carr. 103; Ang. Carr. § 211; The Collenberg, 1 Black, 170; Am Ex. Co. *v.* Smith, 33 Ohio St. 511. Losses of this kind are sometimes spoken of as being caused by the act of God. Browne Carr. 102; Warden *v.* Greer, 6 Watts, 424; but the action of Nature causing the loss is neither sudden, violent, nor irresistible. They do not, therefore, fall within any definition of the act of God. *Ante* § 120. See Hall *v.* Renfro, 3 Metc. (Ky.) 51. In an action against a common carrier for damages for refusing to receive and transport grain, it is competent for the plaintiff to show that such refusal caused the grain to become heated and spoiled, notwithstanding the fact that such injury resulted from the inherent nature of the grain. Pitts. etc. R. Co. *v.* Morton, 61 Ind. 539; 28 Am. Rep. 682.

their inherent vices and propensities,[1] and which excuse the carrier if his negligence does not concur in causing them.[2]

§ 131. **Losses Caused by Seizure under Process.**—A carrier is not liable for goods taken out of his hands by legal process.[3] Where goods are attached in the hands of a common carrier, he can not give them up to the consignee while the attachment is pending.[4] In such case, the carrier is not answerable, even though the goods have been attached for the debt of a third person, and under a proceeding to which the employer of the carrier is not a party. The right of the officer to hold the goods, can only be determined by the court having jurisdiction of the attachment suit. The remedy of the bailor, for an illegal seizure of his goods for the debt of another, is not against the carrier, but against the officer making the seizure, or against the plaintiff in the attachment, if he directed the seizure.[5]

1 Ang. Carr., § 214; Michigan R.Co. *v.* McDonough, 21 Mich. 165; Lake Shore R. Co. *v.* Perkins, 25 Mich. 329; Kansas Pac. R. Co. *v.* Reynolds, 8 Kas. 623; Great Western R. Co. *v.* Blower, 20 W. R. 776; Mo. Pac. R. Co. *v.* Fagan, 9 S. W. Rep. 749 (Tex).

2 Clarke *v.* R. Co., 14 N. Y. 570; Ohio etc. R. Co. *v.* Dunbar, 20 Ill. 623; Smith *v.* R. Co., 12 Allen 531; Hall *v.* Renfro, *supra;* Evans *v.* R. Co., 111 Mass. 142; Conger *v.* R. Co., 6 Duer. 375; Harris *v.* R. Co., 20 N. Y. 232; Powell *v.* R. Co., 32 Pa. St. 414; East Tennessee etc. R. Co. *v.* Whittle, 27 Ga. 535; Welch *v.* R. Co., 10 Ohio St. 65.

3 Stiles *v.* Davis, 1 Black, 101; Bliven *v.* R. Co., 36 N. Y. 403; 35 Barb. 188; Van Winkle *v.* U. S. Mail Co., 37 Barb. 122; Burton *v.* Wilkinson, 18 Vt. 186; Ohio etc. R. Co. *v.* Yohe, 51 Ind. 181; Furman *v.* R. Co., 46 N. W. Rep. 1049 (Ia.); Balt. etc. R. Co. *v.* Davis, 10 Cent. Rep. 630 (Pa.); French *v.* Star Union Trans. Co., 134 Mass. 288; MacVeagh *v.* R. Co., 5 Pac. Rep. 457; Bingham *v.* Lamping, 26 Pa. St. 340; Savannah etc. R. Co. *v.* Wilcox, 48 Ga. 432. "I feel bound to hold, therefore, that seizure by judicial process under the conditions above stated has been added as one of the implied exceptions in the carrier's contract, limiting, *pro tanto*, the general rule of the common law that the carrier is liable for non-delivery under the bill of lading through any causes not excepted therein." Brown, J., in The Chase, 37 Fed. Rep. 708.

4 Stiles *v.* Davis, *ubi supra;* Verrall *v.* Robinson, Tyrw. 1069; *s. c.* 4 Dowl. P. C. 242; *s. c.*, 2 Cromp. M. & R. 495. "It would be absurd for the law to punish a man for not doing—or, in other words to require him to do—that which it forbids his doing." 2 Pars. on Con. 674. "If a coach be damaged by a carrier's fault, whatever is lost he shall be compelled to make good, unless the injury happens by the act of God, *or of the king*, and whatever does not so happen denotes a fault." 2 Colebroke's Dig. Hindu Law, 272.

5 Stiles *v.* Davis, *supra.*

But, when such a seizure is made, the carrier must immediately notify that fact to the consignor.[1] The carrier must assure himself that the proceedings under which the seizure is made are regular and valid; but he is not bound to litigate for his bailor, nor to show that the decision of the court issuing the process is correct in law or fact;[2] it is enough that the writ is valid on its face.[3] And he is not bound to assert the title of the bailor, nor to follow the goods.[4]

In a case decided in England at *nisi prius*, by Lord Ellenborough, in 1808,[5] a vessel had been detained and condemned in Jamaica for a breach of revenue laws; but on appeal the condemnation was reversed. It was held that the master was liable for a loss caused by the delay, the court saying: "You have an action against the officers. The shipper can only look to the owner or master of a ship." This last proposition is clearly wrong. We do not find the case cited in any late English work on Carriers, and it is no doubt regarded as bad law. But in late cases in Massachusetts, it is held that, in a suit against a common carrier for non-delivery of goods, it is no defense that they were taken from the carrier by an officer under an attachment, against any one who was not their owner,[6]

1 Ohio etc. R. Co. *v.* Yohe, *supra;* Bliven *v.* Hudson River R. Co., *supra;* Scrantom *v.* Farmers' Bank, 24 N. Y. 424.

2 Bliven *v.* Hudson River R. Co., 35 Barb. 188.

3 McAlister *v.* R. Co., 74 Mo. 361.

4 Ohio etc. R. Co. *v.* Yohe, *supra.* But see The Chase, 37 Fed. Rep. 708. Where a vessel was detained by a military officer, it was held that the owner of it was not answerable for a loss by reason of a fall of prices of goods on board during the period of detention, he having yielded only to a force which he could not resist. The Onrust, 1 Ben. 431.

5 Gosling *v.* Higgins, 1 Camp. 451. The carrier agreed to deliver the goods at A. On arriving at A the vessel was put in quarantine, and the goods were landed at B, the usual place of landing under the circumstances. Held, that the carrier was discharged from liability; Shepherd *v.* Lanfear, 5 La. 336; 25 Am. Dec. 181.

6 Edwards *v.* White Line Transit Co., 104 Mass. 159; 6 Am. Rep. 213 (1870). The court went astray on the irrelevant and abstract question as to whether, when the property of A is attached as the property of B, it is in the custody of the law as to A. The case is remarkable for a very ineffectual criticism on Stiles v. Davis, *supra.* See Bingham *v.* Lamping, 26 Pa. St. 340; 67 Am. Dec. 418.

or if it turns out that they were by law exempt from attachment.[1]

§ 132. **Losses Caused by Act or Omission of Owner.**—It is clear that if the owner of the goods should directly do an injury to them while in the hands of the carrier, the latter could not be made answerable for such injury. Such a case is not likely to occur; but cases do often occur where the loss or damage to the goods would not have been inflicted if the owner had done everything that he ought to have done. The question in such cases is, whether the owner himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened.[2]

§ 133. **Losses Caused Through Fraud of Owner.**—The carrier has a right to know the value of the goods, so that he may know what risk he takes on himself; what care he should exercise, and what charge he should make.[3] The owner is not bound to state the value unless he is asked to do so,[4] but if he is asked the value, he must answer truly.[5] Neither must the owner mislead the carrier by making him underestimate the value of the goods, even though no questions were asked; as by sending a large sum of money concealed

[1] Kiff *v.* Old Colony etc. R. Co., 117 Mass. 429; 19 Am. Rep. 429.

[2] Railroad Co. *v.* Jones, 95 U. S. 439. As where a shipper of stock opened a window in the car, which the carrier had shut, and the horse jumped through the window and was killed. Hutchinson *v.* R. Co., 37 Minn. 524; Newby *v.* R. Co., 19 Mo. App. 391. So where a consignor of goods agrees that they may be loaded and transferred on open cars, the carrier, in the absence of negligence on his part, is not liable for any damage caused to the goods by being so loaded and transported. Western etc. R. Co., *v.* Exposition Cotton Mills, 7 S. E. Rep., 916 (Ga.)

[3] See *post* § 142.

[4] Railroad Co. *v.* Fraloff, 100 U. S. 96; Brooke *v.* Pickwick, 4 Bing. 218; Southern Express Co. *v.* Crook, 44 Ala. 468; Gorham Mfg. Co. *v.* Fargo, 45 How. Pr. 90; Camden etc. R. Co. *v.* Baldauf. 16 Pa. St. 67; Relf *v.* Rapp, 3 W. & S. 21.

[5] Camden etc. R. Co. *v.* Baldauf, *supra;* Phillips *v.* Earle, 8 Pick. 182; Boskowitz *v.* Adams Ex. Co., 5 Cent. L. J. 58.

in a bag of hay,[1] or placed in a box with articles of small value,[2] or by sending a diamond ring in a small paper box tied with a string,[3] or by sending valuable jewelry under any circumstances which would naturally lead the carrier to suppose it to be of but trifling value;[4] and if he does thus mislead the carrier, and the goods are afterwards stolen or lost, the carrier is not liable.[5] In all cases of this kind, the owner is held to be guilty of constructive fraud, although, in point of fact, no fraud was intended.[6] In further illustration of this important rule requiring fair dealing on the part of the owner, it may be mentioned that if one sends glass articles in a box without informing the carrier of the nature of the articles, and they are broken;[7] or sends a trunk labelled as containing articles of a different and smaller value than those really contained therein, and they are stolen;[7] or sends a check indorsed in blank in a letter, without informing the carrier of the contents of the letter, and the letter is stolen;[9] or sends money in a package, knowing that by the rules of the carrier money packages are required to be put up, indorsed and sealed in a particular way, which requirement is disregarded, and the money is stolen, the carrier will not be liable.[10]

1 Gibbon *v.* Paynton, 4 Burr 2298.

2 Chicago etc. R. Co. *v.* Thompson, 19 Ill. 578; Magnin *v.* Dinsmore, 62 N. Y. 35; Earnest *v.* Express Co., 1 Woods, 573; Belger *v.* Dinsmore, 51 N. Y. 166.

3 Everett *v.* Southern Express Co., 46 Ga. 303; Sleat *v.* Fagg, 5 Barn. & Ald. 342.

4 Oppenheimer *v.* United States Express Co., 69 Ill. 62.

5 Tyly *v.* Morrice, 3 Carth. 485; Titchburne *v.* White, 1 Strange, 145; Earnest *v.* Express Co., 1 Woods, 579; Coxe *v.* Heisley, 19 Pa. St. 243; Hollister *v.* Nowlen, 19 Wend. 234; Everett *v.* Southern Express Co., 46 Ga. 303; Cincinnati etc. R. Co. *v.* Marcus, 38 Ill. 219; Hellman *v.* Holladay, 1 Woolw. 365; Kenrig *v.* Eggleston, Aleyn 93; Orange County Bank *v.* Brown, 9 Wend. 85.

6 Chicago etc. R. Co. *v.* Thompson, 19 Ill. 578; Cooper *v.* Berry, 21 Ga. 526; Great Northern R. Co. *v.* Shepherd, 14 Eng. Law & Eq. Rep. 367.

7 American Express Co. *v.* Perkins, 42 Ill. 458.

8 Relf *v.* Rapp, *supra;* Hollister *v.* Nowlen, *supra.*

9 Hayes *v.* Wells, 23 Cal. 185.

10 St. John *v.* Express Co., 1 Woods, 612.

§ 134. **Losses Caused by Neglect of Owner.**—If goods are sent by a carrier, without being legibly marked, in consequence of which the owner sustains a loss or inconvenience, without any fault of the carrier, he can not hold the carrier bound for it.[1] Nor is the latter liable for a loss occasioned by the negligence of the shipper in packing the goods.[2]

But he is liable for injuries to such goods to which the bad packing did not contribute.[3] Improper packing which will excuse a carrier of goods is some internal and latent defect of which the carrier does not know, and from which loss or damage ensues to the goods in the ordinary course of handling and transportation. Goods may be delivered to the carrier unpacked; and if they are in that condition injured by the mere handling or transportation in a careful manner, the owner must bear the loss; but if they are injured by rain or other cause for which the carrier is not excused, he is responsible.[4]

§ 135. **Owner Undertaking Part of Carrier's Duties.**—Where the owner himself undertakes a part of the duties which would otherwise devolve on the carrier, the responsibility for results growing out of the discharge of those duties rests on the owner, and the carrier is not liable in respect thereof.[5] If the own-

1 The Huntress, Davies 82; Finn *v.* R. Co., 102 Mass. 283. Erie R. Co. *v.* Wilcox, 84 Ill. 239; 25 Am. Rep. 451; South. Ex. Co. *v.* Kaufman, 12 Heisk. 161. In an action against a common carrier to recover for damages to fruit trees missent, *held*, that the plaintiff was guilty of contributory negligence in marking the goods "Inka, Iowa," without designating Tama County, there being another town named "Inka" in Keokuk County. Congar *v.* R. Co., 24 Wis. 157; Am. Rep. 164.

2 Ang. Carr. § 212; Klauber *v.* American Express Co., 21 Wis. 21; The Colonel Ledyard, 1 Sprague 530; Hayes *v.* Wells, 23 Cal. 185.

3 Shriver *v.* Sioux City etc. R. Co., 24 Minn. 506; 31 Am. Rep. 353.

4 Klauber *v.* Am. Exp. Co., 21 Wis. 21; 91 Am. Dec. 452; see Stewart *v.* Crowley, 2 Stark. 323; Gorham Mnfg. Co. *v.* Fargo, 35 N. Y. (S.C.) 434.

5 Patton *v.* Johnson, 131 Mass. 297.

er of cattle goes with them, under an agreement with the railroad, to give certain attention to the cattle, the company will not be liable for losses occasioned by his inattention to the duties undertaken by him.[1] In these cases there was negligence on the part of the owner; but negligence is not a necessary element of the rule. Thus, if hogs are sent in a car selected by the owner, and not belonging to the carrier, and they are injured by reason of a defect in such car, the carrier is not liable—at least, if the defect in the car was not known to the latter.[2] So, when the consignor of goods agrees that they may be loaded and transferred on open cars, the carrier, in the absence of negligence on his part, is not liable for any damage caused to the goods by being so loaded and transported.[3] The carrier is not liable where the goods are transported in a car, in the exclusive control of the shipper's agent, and are destroyed by his act, whether accidental or negligent.[4] There is, of course, a still stronger reason for the application of the rule where the shipper undertakes to put the property on a car, and puts it on accordingly, knowing the car to be unsafe, and neglecting to inform the carrier of that fact, and a loss occurs by reason of the defect in the car,[5] or in appliances furnished by him, the shipper.[6]

But if the goods are delivered to a carrier in a storm, and he receives them, his common-law liability at once

1 South Alabama etc. R. Co. *v.* Henlein, 52 Ala. 606; Tower *v.* Utica etc. R. Co., 7 Hill 47; Gleason *v.* Goodrich Trans. Co., 32 Wis. 85; Roderick *v.* Railroad Co., 7 W. Va. 54; Harvey *v.* Rose, 26 Ark. 3; McBeath *v.* R. Co., 20 Mo. (App.) 445; East Tenn. etc. R. Co. *v.* Johnson, 75 Ala. 576; 51 Am. Rep. 489; Newby *v.* R. Co., 19 Mo. (App.) 391.

2 Illinois Cent. R. Co. *v.* Hall, 58 Ill. 409.

3 West. etc. R. Co. *v.* Ex. Cotton Mills, 7 S. E. Rep. 916.

4 Hart *v.* R. Co., 69 Iowa, 485; East Tenn. R. Co. *v.* Whittle, 27 Ga. 535; 73 Am. Dec. 731.

5 Betts *v.* Farmers' Loan Co., 21 Wis. 80.

6 Loveland *v.* Burke, 120 Mass. 139; 21 Am. Rep. 507; Ross *v.* R. Co., 49 Vt. 364; 24 Am. Rep. 144.

attaches;[1] and if the goods are placed by a carrier in an open car, when they should have been placed in a closed one, the mere fact that the owner knew of this at the time, will not relieve the carrier from responsibility for their safety.[2] So, an agreement for the performance of the duties of the carrier in a particular manner will have the effect to relieve him of a part of his responsibilities. Thus, if goods are shipped under a contract that they shall be carried on deck, the shipper, having exercised his judgment as to the place of stowage, takes upon himself all the risk arising therefrom;[3] and if one prefers to send a wagon on a platform-car, to taking it to pieces and putting it in a box-car, and it is blown off by the wind, the carrier is not liable.[4] These cases are but illustrations of the principle first laid down in this section, since in each of them the owner uses his own discretion as to the manner of the carriage, instead of leaving the matter wholly to the carrier.

But even where the owner takes upon himself the duties, or some of the duties of the carrier, this will not release the carrier from liability for his own neglect.[5] Thus, where a shipper agreed to accompany his stock, and feed and water them at his own risk, it was held that the carrier was liable for loss because of his failure to furnish him proper facilities for so doing.[6] So, in Georgia, a railroad received a car-load of mules to be delivered at A. It was agreed that the company was not to feed or water the mules, but that the ship-

[1] New Brunswick Steam Navigation Co. *v.* Tiers. 24 N. J. 677; The Stamdiffe, 15 Fed. Rep. 350.

[2] Montgomery etc. R. Co. *v.* Edmonds, 41 Ala. 667; Hawkins *v.* Great Western R. Co., 17 Mich. 57; Great Western R. Co. *v.* Hawkins, 18 Mich. 427.

[3] Lawrence *v.* Minturn, 17 How. 100; Chubb *v.* Renaud, 26 Law Rep. 492.

[4] Miltimore *v.* R. Co., 37 Wis. 190; Ross *v.* R. Co., 49 Vt. 364.

[5] Penn *v.* R. Co., 49 N. Y. 204; 10 Am. Rep. 355; Pratt *v.* R. Co., 102 Mass. 557.

[6] Wabash etc. R. Co. *v.* Pratt, 15 Ill. App. 177.

per was to be afforded facilities for this. The company negligently carried the mules to D, forty miles beyond A, and they stood there in cars two days, without food, water, or care. It was held that the company was liable for the damages.[1]

1 Bryant *v.* R. Co., 68 Ga. 805.

CHAPTER XII.

MODIFICATION OF LIABILITY BY AGREEMENT.

SECTION 136. Power of Common Carrier to Limit his Liability.—In England.

137. In the United States.

138. Reasons for the American Rule.

139. Anomalous Doctrines in New York, Illinois and Pennsylvania.

140. Notices Limiting the Carrier's Liability.

141. Distinctions Between Notices Limiting Liability and Notices of Reasonable Regulations.

142. Notices as to Value and Character of Goods.

143. Methods of Giving Notice.—Advertisements and Placards.

144. Notices in Receipts or other Vouchers.

145. Notice Assented to Constitutes a Contract.

146. Assent not Inferred from Mere Knowledge.

147. Accepting Papers Containing Limitations or Conditions.

148. Bills of Lading.

149. Express Receipts.

150. Baggage Checks.

151. Requisites to Validity of such Notices.

152. There Must be no Mistake.

153. Nor Duress.

154. Nor Fraud.

155. Nor Waiver.

156. Nor Antecedent Parol Contract.

157. Must have a Consideration.

158. Time and Manner of Making Claim.

159. Other Conditions.

160. Bills of Lading as Receipts and Contracts.

161. Effect of the Special Contract.

162. Contracts Construed Strictly Against Carrier.

Conditions and Exceptions Peculiar to Carriage by ***Water.***

163. Call at Ports.

164. Damage.

165. Dangers of the Roads.

166. Dangers of the Seas and Perils of Navigation.

167. Deficiency in Quantity.
168. Extraordinary Marine Risk.
169. Fire.
170. Good Order and Condition.
171. Invoice Value.
172. Leakage and Breakage.
173. On Lakes and Rivers.
174. Pilot, Master or Mariners.
175. Port of Discharge.
176. Privilege of Re-shipping.
177. Quantity Guaranteed.
178. Ready to Discharge.
179. Restraints of Princes.
180. Robbers and Thieves.
181. Tow and Assist Vessels.
182. Value and Contents Unknown.

Conditions and Exceptions Peculiar to Carriage by Land.

183. All Rail.
184. Article.
185. C. O. D.
186. Depot.
187. Feed, Water and take Proper Care.
188. Fire.
189. Household Goods.
190. Load and Unload.
191. Loss.
192. On the Train.
193. Package or Thing.
194. Perishable Property.
195. Place of Destination.
196. Through Without Transfer.
197. Transit.
198. Unavoidable or Inevitable Accident.
199. Value or Cost.

§ 136. **Power of Common Carrier to Limit his Liability.** —In England, the power of a common carrier to limit his extraordinary liability, seems not to have been admitted by the earlier writers on the common law. In the Doctor and Student, it is said: "If he (the carrier) would *per case* refuse to carry it unless promise were made unto

him that he shall not be charged for no misdemeanor that should be in him, the promise were void; for it were against reason and good manners; and so it is in all other cases like."[1] And so in Noys Maxims it is said: "If a carrier would refuse to carry unless a promise were made to him that he shall not be charged with any such miscarriage, that promise is void."[2] In *Hide* v. *Proprietors*,[3] Lord Kenyon said: "There is a difference where a man is chargeable by law generally, and where on his own contract. Where a man is bound to any duty and chargeable to a certain extent by the operation of law, in such case he cannot by any act of his own, discharge himself," putting the case of common carriers who, he says, can not discharge themselves "by any act of their own, as by giving notice for example to that effect." But Lord Kenyon can hardly be considered as meaning that the employer of the carrier could not waive something of the strictness of his rights by a special agreement with the carrier, or that such an agreement would not inure to the benefit of the latter, though such a construction has been frequently placed on his language.[4] He more probably meant to say that the carrier could not by any *ex parte*, "act of his own," "as by giving notice," unassented to by the other party, "discharge himself." Eleven years later, Lord Ellenborough spoke of the power of carriers to restrict their general liability by express contract as being undoubted.[5] The earliest authority which is cited in support of the relaxation of the ancient rule, is the note of Sir Edward Coke to *Southcote's Case*, an authority often quoted on this subject, but which is somewhat ambiguous; "*Nota*, reader, it is good policy

1 Dial. 2 Ch. 38.
2 Max. 92.
3 1 Esp. 36 (1793).
4 As in Hollister *v.* Nowlen. 19 Wend. 234.
5 Nicholson *v.* Willan, 5 East. 507 (1804).

for him who takes goods to keep, to take them in special manner, *scil.* to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance. So, if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged by his general acceptance, which implies that he takes upon to do it."[1] But this case was one against an ordinary bailee without reward, and Coke, apparently, was not speaking of common carriers. Neither was the doctrine that a carrier may limit his liability by a special acceptance definitely acknowledged by Sir Matthew Hale, in *Morse* v. *Slue*,[2] as some writers, Browne, Redfield, and Story, among others, have said. But by the early part of the present century,[3] it was settled in England that common carriers might limit their liabilities by a general notice,[4] or by a special contract,[5] and that they might legally contract for exemption from the consequences of their own neglect.[6]

1 Southcote's Case, 4 Rep. 84 (1601).

2 1 Vent. 190 (1684).

3 In 1804 Lord Ellenborough remarked: "There is no case to be met with in the books in which the right of a carrier thus to limit by special contract his own responsibility, has ever been by express decision denied." Nicholson *v.* Willan, 5 East. 507.

4 Maving v. Todd, 1 Stark. 72; Leeson *v.* Holt, 1 Stark. 186; Nicholson *v.* Willan, 5 East. 507. In Leeson *v.* Holt (1816) Lord Ellenborough said that the limitations made in this manner seemed to have excluded all responsibility whatever.

5 Nicholson *v.* Willan, 5 East, 507 (1804); Anonymous *v.* Jackson, Peakes Add. Cas. 185 (1800); Covington *v.* Willan, Gow. 115 (1819); Munn *v.* Baker, 2 Stark. 255 (1817); Clay *v.* Willan, 1 H. Bl. 298 (1789); Clarke *v.* Gray, 6 East, 564 (1805); Hyde *v.* Trent Nav. Co., 5 T. R. 389 (1793); Izett *v.* Mountain, 4 East, 371 (1803); Ranger *v.* Great Western R. Co., 1 Railway Cas. 1 (1838); Riley *v.* Horne, 5 Bing. 217 (1828); Harris *v.* Packwood, 3 Taunt. 264 (1810); Smith *v.* Horne, 8 *Id.* 144 (1818); Leeson *v.* Holt, 1 Stark. 186 (1816); Beck *v.* Evans, 16 East, 244 (1812); Lowe *v.* Booth, 13 Price, 329 (1824); Wyld *v.* Pickford, 8 M. & W. 443 (1841); Carr *v.* Lancashire etc. R. Co., 7 Exch. 707 (1852).

6 Maving *v.* Todd, 1 Stark. 72 (1815); Leeson *v.* Holt, 1 Stark. 186 (1816). In The Majestic, 60 Fed. Rep. 624 (1894),

Finally, after many expressions of regret by the greatest judges of the English bench, in numerous cases, that the common law rule had not been adhered to in prescribing the measure of the liability of the carrier in every instance,[1] Parliament declared that stipulations limiting the liability of the common carrier within the United Kingdom, should be invalid unless, in the opinion of the court before whom the case was tried, such stipulations were "just and reasonable"[2]—thus placing the whole railroad system under the control of the Judicial tribunals.[3]

§ 137. **In the United States.**—We have seen that a common carrier has two distinct liabilities, including, first, all losses occasioned by accident or mistake, and without his fault, where he is liable by the custom of the realm, or the common law, as an insurer; and second, all losses occasioned by his default or negligence, where he is liable as an ordinary bailee.[4] In the United States, it is almost universally held that he may limit his responsibility as an insurer, by *special contract*, but that he cannot by any contract exempt himself from responsibility for the consequences of his own negligence, or for the negligence of his agents or servants. This is so well established in nearly every one of the States, as well as in the Fed-

Shipman, J., says: "It is well known, and in Liverpool etc. Steam. Co. *v.* Phœnix Ins. Co., 129 U. S. 397, the Supreme Court (of the United States) has declared that by the law of England common carriers by land or sea, except so far as they are controlled by the Provisions of the Railway and Canal Traffic Act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by the negligence of their servants."

[1] Lawson, Cont. of Carr., § 26, La Blanc J. in Beck *v.* Evans, 16 East. 214; Mansfield, C. J., in Harris *v.* Packwood, 3 Taunt. 264; Best, C. J., in Brooke *v.* Pickwick, 4 Bing. 218; Ellenborough, C. J., in Nicholson *v.* Willan, 5 East. 507; Down *v.* Fremont, 4 Camp. 40; Maving *v.* Todd, 1 Stark 72, and Kerr *v.* Willan, Holt. 645; Parker J., in Smith *v.* Horne, Holt. 643; and Burroughs J. in the same case.

[2] 17 and 18 Vic. c. 31, Railway and Canal Traffic (1854).

[3] Jervis, C. J., in London etc. R. Co. *v.* Dunham, 18 C. B. 826.

[4] *Ante*, §§ 117, 118.

eral courts, as to justify its being called the American Rule.[1]

1 *Federal Courts*—Railroad Co. *v.* Lockwood, 17 Wall. 357; Railroad Co. *v.* Pratt, 22 Wall. 123; Earnest *v.* Express Co., 1 Wood 573; Express Co. *v.* Kountze, 8 Wall. 342; Hunnewell *v.* Tabor, 2 Sprague 1; The Pacific, 1 Deady 17; The City of Norwich, 4 Ben. 271; Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; The May Queen, 1 Newb. Adm. 465; The New World *v.* King, 16 How. 469; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; York Co. *v.* R. Co., 3 Wall. 107; The Rocket, 1 Biss. 354; The David and Caroline, 5 Blatchf. 266; The Bellona, 4 Ben. 503; Nelson *v.* National Steamship Co., 7 Ben. 340; The Invincible, 1 Low. 226; Liverpool etc. Steam Nav. Co. *v.* Phœnix Ins. Co., 129 U. S. 397; The Delhi, 4 Ben. 345; Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; Railroad Co. *v.* Stevens, 95 U. S. 655; Ayres *v.* Western Co., 14 Blatchf. 9; Galt *v.* Adams Express Co., McAr. & Mackey 124; 28 Am. Rep. 742; Hart *v.* R. Co., 112 U. S. 331; Phœnix Ins. Co. *v.* Erie etc. Trans. Co., 117 U. S. 312; Ormsby *v.* R. Co., 4 Fed. Rep. 706; May *v.* The Powhattan, 5 Fed. Rep. 375; The Montana, 17 Fed. Rep. 377; 22 Id. 715; The Brantford City, 29 Fed. Rep. 323; The Majestic, 60 Fed. Rep. 624; Thomas *v.* R. Co., 63 Fed. Rep. 200. *Alabama*—Grey *v.* Mobile Trade Co., 55 Ala. 387; 28 Am. Rep. 729; Steele *v.* Townsend, 37 Ala. 247; 79 Am. Dec. 50; South R. Co. *v.* Henlein, 52 Ala. 606; 23 Am. Rep. 578, 56 Ala. 368; Southern Ex. Co. *v.* Armstead, 50 Ala. 350; Southern Ex. Co. *v.* Crook, 44 Ala. 468; 4 Am. Rep. 140; Mobile etc. R. Co. *v.* Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Southern Ex. Co. *v.* Caperton, 44 Ala. 101; 4 Am. Rep. 118; Mobile etc. R. Co. *v.* Jarboe, 41 Ala. 644; Louisville etc. R. Co. *v.* Oden, 80 Ala. 38; Alabama etc. R. Co. *v.* Little, 71 Ala. 611; Tenn. etc. R. Co. *v.* Johnston, 75 Ala. 576; 51 Am. Rep. 489; Alabama etc. R. Co. *v.* Thomas, 83 Ala. 343; Louisville etc. R. Co. *v.* Meyer, 78 Ala. 597. *Arkansas*—Taylor *v.* R. Co., 32 Ark. 393; 29 Am. Rep. 1; St. Louis etc. R. Co. *v.* Lesser, 46 Ark. 236; Little Rock etc., R. Co. *v.* Talbot, 39 Ark. 523; Taylor *v.* R. Co., 39 Ark. 148; Little Rock R. Co. *v.* Talbot, 47 Ark. 97. *California*—Cal. Civ. Code, §§ 2174, 2175. *Colorado*—Merchants' Dispatch Co. *v.* Cornforth, 3 Col. 280; 25 Am. Dec. 757; Western Union Tel. Co. *v.* Graham, 1 Col. 230; Overland Mail Co. *v.* Carroll, 7 Colo. 43. *Connecticut*—Welch *v.* R. Co., 41 Conn. 333; Derwort *v.* Loomer, 21 Conn. 245; Camp *v.* Hartford Steamboat Co., 43 Conn. 333; Lawrence *v.* R. Co., 36 Conn. 63; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539; 39 Am. Dec. 398; Peck *v.* Weeks, 34 Conn. 145. *Dakota*—Dak. Civ. Code, §§ 1258, 1262. *Georgia*—Cooper *v.* Berry, 21 Ga. 526; Berry *v.* Cooper, 28 Ga. 543; Southern Exp. Co. *v.* Newby, 36 Ga. 635; 91 Am. Dec. 783; Wallace *v.* Matthews, 39 Ga. 617; 99 Am. Dec. 473; Wallace *v.* Sanders, 42 Ga. 486; Georgia R. Co. *v.* Beatie, 66 Ga. 75; 42 Am. Rep. 75; Georgia R. Co. *v.* Spears, 66 Ga. 485; 42 Am. Rep. 81; Georgia R. Co. *v.* Gann, 68 Ga. 350; Southern Ex. Co. *v.* Purcell, 37 Ga. 103; 92 Am. Dec. 53; Cent. R. Co. *v.* Bryant, 73 Ga. 722. *Delaware*—Flinn *v.* R. Co., 1 Houst. 469. *Illinois*—Anchor Line *v.* Dater, 68 Ill. 369; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88; 5 Am. Rep. 92; Western Trans. Co. *v.* Newhall, 24 Ill. 466; 76 Am. Dec. 760; Field *v.* R. Co., 71 Ill. 458; Illinois Cent. R. Co. *v.* Morrison, 19 Ill. 136; Chicago etc. R. Co. *v.* Montfort, 60 Ill. 175; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354; 87 Am. Dec. 301; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484; 87 Am. Rep. 260; Baker *v.* R. Co. 42 Ill. 73; Erie etc. Trans. Co. *v.* Dater, 91 Ill. 195; Merchants' Dispatch Trans. Co. *v.* Theilbar, 86 Ill. 71; Illinois Cent. R. Co. *v.* Adams, 42 Ill. 474; 92 Am. Dec. 85; Boscowitz *v.* Adams Ex. Co., 93 Ill. 523; 34 Am. Rep. 191; Erie R. Co. *v.* Wilcox, 84 Ill. 239; 25 Am. Rep. 451; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184; 14 Am. Rep. 57; Illinois Cent. R. Co. *v.* Jonte, 13 Ill. App. 424 *Indiana.*—St. Louis etc. R. Co. *v.* Smuck, 49 Ind. 302; Michigan etc. R. Co. *v.* Heaton, 37 Ind. 448; 10 Am. Rep. 89; Ohio etc. R. Co. *v.* Selby, 47 Ind. 471; 17 Am. Rep. 719; United States Ex. Co. *v.* Har-

§ 138. **Reasons for the American Rule.**—The American rule has its foundation upon the relation which the carrier and the bailor hold to each other, and the danger of fraud, actual or constructive. "By constructive frauds are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury

ris, 51 Ind. 127; Adams Ex. Co. *v.* Reagan, 29 Ind. 21; 92 Am. Dec. 332; Indianapolis etc. R. Co. *v.* Allen, 31 Ind. 394; Wright *v.* Gaff, 6 Ind. 416; Thayer *v.* R. Co., 22 Ind. 26; 85 Am. Dec. 409; Adams Exp. Co. *v.* Fendrick, 38 Ind. 150; Rosenfeld *v.* R. Co., 103 Ind. 121; 53 Am. Rep. 300; Bartlett *v.* R. Co., 94 Ind. 281. *Iowa.*—See Laws 1866, c. 13, p. 121; Code, § 1307; Hart *v.* R. Co., 69 Ia. 485; and see McCoy *v.* R. Co., 44 Ia. 424; Brush *v.* R. Co., 43 Ia. 554; McDaniel *v.* R. Co., 24 Ia. 412; Mulligan *v.* R. Co., 36 Ia. 180; Rose *v.* R. Co., 39 Ia. 246; Whitmore *v.* Bowman, 4 G. Green, 148; Carson *v.* Harris, *Id.* 516. *Kansas.*—Goggin *v.* R. Co., 12 Kan. 416; Railroad Co. *v.* Caldwell, 8 Kan. 244; Kansas etc. R. Co. *v.* Reynolds, 8 Kan. 623; Kallman *v.* United States Exp. Co., 3 Kan, 205; Kansas etc. R. Co. *v.* Nichols, 9 Kan. 235; 12 Am. Rep. 494; St. Louis etc. R. Co. *v.* Piper, 13 Kan. 505; Sprague *v.* R. Co., 34 Kas. 347. *Kentucky.*—Adams Exp. Co. *v.* Guthrie, 9 Bush, 78; Adams Exp. Co. *v.* Nock, 2 Duv. 562; 87 Am. Dec. 510; Louisville etc. R. Co. *v.* Hedger, 9 Bush, 645; 15 Am. Rep. 740; Rhodes *v.* R. Co., 9 Bush, 688; Orndorff *v.* Adams Exp. Co., 3 Bush, 194; 96 Am. Dec. 207; Reno *v.* Hogan, 12 B. Mon. 63; 54 Am. Dec. 513; Louisville etc. R. Co. *v.* Brownlee, 14 Bush, 590. *Louisiana.*—Roberts *v.* Riley, 15 La. Ann. 103; 77 Am. Dec. 183; Simon *v.* Fung Shuey, 21 La. Ann. 363; New Orleans Mut. Ins. Co. *v.* R. Co., 20 La. Ann. 302; Baldwin *v.* Collins, 9 Rob. (La.) 468; Higgins *v.* R. Co., 28 La. Ann. 133; Logan *v.* R. Co., 11 Rob. (La.) 24; 43 Am. Dec. 199; Tardos *v.* R. Co., 35 La. Ann. 75. *Maine.*—Sager *v.* R. Co., 31 Me. 228; 50 Am. Dec. 659; Bean *v.* Green, 12 Me. 422; Willis *v.* R. Co., 62 Me. 488; Fillebrown *v.* R. Co., 55 Me. 462; 92 Am. Dec. 606; Little *v.* R. Co., 66 Me. 239. *Maryland.*—Brehme *v.* Adams Exp. Co., 25 Md. 328; McCoy *v.* Erie Trans. Co., 42 Md. 498. *Massachusetts.*—Brown *v.* R. Co., 11 Cush. 97; Gott *v.* Dinsmore, 111 Mass. 45; Malone *v.* R. Co., 12 Gray, 388; 74 Am. Dec. 598; Judson *v.* R. Co., 6 Allen, 485; 83 Am. Dec. 646; Perry *v.* Thompson, 98 Mass. 249; Grace *v.* Adams, 100 Mass. 505; 1 Am. Rep. 131; 97 Am. Dec. 117; Hoadley *v.* Northern Trans. Co., 115 Mass. 304; 15 Am. Rep. 106; Pemberton Co. *v.* R. Co., 104 Mass. 124; Squire *v.* R. Co., 98 Mass. 239; 93 Am. Dec. 162; School District *v.* R. Co., 102 Mass. 552; 3 Am. Rep. 502; Buckland *v.* Adams Exp. Co., 97 Mass. 124; 93 Am. Dec. 68. *Michigan.*—Am. Trans. Co. *v.* Moore, 5 Mich. 368; McMillan *v.* R. Co., 16 Mich. 79; 93 Am. Dec. 208; see Mich. Cent. R. Co. *v.* Ward, 2 Mich. 538 overruled in Mich. Cent. R. Co. *v.* Hale, 6 Mich. 243; Feige *v.* R. Co., 62 Mich. 1; 28 N. W. Rep. 685. *Minnesota.*—Christenson *v.* Am. Exp. Co., 15 Minn. 270; 2 Am. Rep. 122; Jacobus *v.* R. Co., 20 Minn. 125; 18 Am. Rep. 360; Shriver *v.* R. Co., 24 Minn. 506; 30 Am. Rep. 353; Moulton *v.* R. Co., 31 Minn. 85; 47 Am. Rep. 781; Ortt *v.* R. Co., 36 Minn. 396; Brehl *v.* R. Co., 46 N. W. Rep. 333; Hull *v.* R. Co., 43 N. W. Rep. 391. *Mississippi.*—Mobile etc. R. Co. *v.* Weiner, 49 Miss. 725; Whitesides *v.* Thurlkill, 12 S. & M. 597; 51 Am. Dec. 128; Chicago etc. R. Co. *v.* Abels, 60 Miss. 1017; New Orleans etc. R. Co. *v.* Faler, 58 Miss. 911; Chicago etc. R. Co. *v.* Moss, 60 Miss. 1003; 45 Am. Rep. 428. *Missouri.*—Ketchum *v.* Am. Exp. Co., 52 Mo. 390; Lupe *v.* R. Co., 3 Mo. App. 77; Cantling *v.* R. Co., 54 Mo. 385; 14 Am. Rep. 476; Levering *v.* Union Trans. etc. Co., 42 Mo. 88; 97 Am. Dec. 320; Rice *v.* R. Co., 63 Mo. 314; Sturgeon *v.* R. Co., 65 Mo. 569; Oxley *v.* R. Co., 65 Mo. 629; Clark *v.* R.

upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore, are prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*."[1] The courts therefore, have been

Co., 64 Mo. 440; Snider *v.* Adams Exp. Co., 63 Mo. 376; Read *v.* R. Co., 60 Mo. 199; Kirby *v.* Adams Exp. Co., 2 Mo. App. 369; Drew *v.* Red Line Transit Co., 3 Mo. App. 495; McFadden *v.* R. Co., 92 Mo. 343; 1 Am. St. Rep. 721; St. Louis etc. R. Co., *v.* Cleary, 77 Mo. 634; 46 Am. Dec. 13; Brown *v.* R. Co., 18 Mo. (App.) 569; Dawson *v.* R. Co., 79 Mo. 276; Ball *v.* R. Co., 83 Mo. 574; Craycraft *v.* R. Co., 18 Mo. (App.) 437; Potts *v.* R. Co., 17 Mo. (App.) 394; Tibby *v.* R. Co., 82 Mo. 292; Mo. Pac. R. Co. *v.* Vandeventer, 41 N. W. Rep. 998. *Nebraska.*—Atchison etc. R. R. Co. *v.* Washburn, 5 Neb. 117; Hutchison *v.* R. Co., 37 Neb. 524. *New Hampshire.*—Bennett *v.* Dutton, 10 N. H. 481; Moses *v.* R. Co., 24 N. H. 71; 55 Am. Dec. 222; 32 N. H. 523; 64 Am. Dec. 381; Barter *v.* Wheeler, 49 N. H. 9; Rand *v.* R. Co., 59 N. H. 363; *New Jersey.*—Ashmore *v.* Penn. Steam Co., 28 N. J. (L.) 180. *North Carolina.*—Lee *v.* R. Co., 72 N. C. 236; Smith *v.* R. Co., 64 N. C. 235; Phifer *v.* R. Co., 89 N. C. 311; 45 Am. Rep. 607; Whitehead *v.* R. Co., 87 N. C. 255. *Ohio.*—Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Ohio St. 362; 62 Am. Dec. 285; Welsh *v.* R. Co., 10 Ohio St. 65; 75 Am. Dec. 490; Cleveland etc. R. Co. *v.* Curran, 19 Ohio St. 1; 2 Am. Rep. 362; Cincinnati etc. R. Co. *v.* Pontius, 19 Ohio St. 221; 2 Am. Rep. 391; Knowlton *v.* R. Co., 19 Ohio St. 260; 2 Am. Rep. 395; United States Ex. Co. *v.* Bachman, 2 Cin. Rep. 251; 28 Ohio St. 144; Erie R. Co. *v.* Lockwood, 28 Ohio St. 358; Gaines *v.* Union Trans. Co., 28 Ohio St. 418; Union Ex. Co. *v.* Graham, 26 Ohio St. 595; Pitts. etc. R. Co. *v.* Barrett, 36 Ohio St. 448. *Tennessee.*—Olwell *v.* Adams Ex. Co., 1 Cent. L. J. 100; Craig *v.* Childress, Peck 270; 14 Am. Dec. 751; Nashville etc. R. Co. *v.* Jackson, 6 Heisk. 271; Southern Ex. Co. *v.* Womack, 1 Heisk. 256; East Tenn. etc. R. Co. *v.* Nelson, 1 Cold. 272; Walker *v.* Skipwith, Meigs 502; 33 Am. Dec. 161; Dillard *v.* R. Co., 2 Lea, 288; Merchants' Disp. Trans. Co. *v.* Block, 86 Tenn. 392; 6 Am. St. Rep. 847; Coward *v.* R. Co., 16 Lea 225; 57 Am. Rep. 226. *Texas.*—Stat. Pasch. Dig. art. 425, R. S. art. 278; Houston etc. R. Co. *v.* Burke, 55 Tex. 323; 40 Am. Rep. 808; Gulf etc. R. Co. *v.* McGown, 65 Tex. 640; Gulf etc. R. Co. *v.* Trawick, 68 Tex. 314; 2 Am. St. Rep. 495; Houston etc. R. Co. *v.* Park, 1 Tex. (App.) Cas. 332; Mo. Pac. R. Co. *v.* Harris, *id.* 1257; Heaton *v.* R. Co., *id.* 774; Texas Ex. Co. *v.* Scott, 2 Tex. (App.) Cas. 73; Tex. etc. R. Co. *v.* Hamm, *id.* 496; Tex. etc. R. Co. *v.* Davis, *id.* 192; Tex. etc. R. Co. *v.* Dupree, *id.* 318. *Vermont.*—Farmers' etc. Bank *v.* Champlain Trans. Co., 18 Vt. 131; 23 Vt. 186; 56 Am. Dec. 68; Mann *v.* Birchard, 40 Vt. 326; 94 Am. Dec. 398; Blumenthal *v.* Brainerd, 38 Vt. 402; 91 Am. Dec. 349; Kimball *v.* R. Co., 26 Vt. 247; 62 Am. Dec. 567. *Virginia.*—Wilson *v.* R. Co., 21 Gratt. 654; Virginia etc. R. Co., *v.* Sayers, 26 Gratt. 328. *West Virginia.*—Balt. etc. R. Co. *v.* Skeels, 3 W. Va. 586; Maslin *v.* R. Co., 14 W. Va. 180; 36 Am. Rep. 478; Brown *v.* Express Co., 15 W. Va. 812; overruling Baltimore etc. R. Co. *v.* Rathbone, 1 W. Va. 77, where the doctrine of the New York cases had been adopted. *Wisconsin.*—Boorman *v.* Am. Exp. Co., 21 Wis. 152; Betts *v.* Farmers' Loan Co., 21 Wis. 80; 91 Am. Dec. 460; Black *v.* Goodrich Trans. Co., 55 Wis. 319; 42 Am. Rep. 319; Annas *v.* R. Co., 67 Wis. 46; 57 Am. Rep. 388; Morrison *v.* Trans. Co., 61 Wis. 596; Lawson *v.* R. Co., 64 Wis. 447; 54 Am. Rep. 634; Abrams *v.* R. Co., 58 N. W. Rep. 780.

[1] Story Eq. Jur., § 258.

called upon to consider whether by reason of the peculiar position which a common carrier occupies towards the public, he has not such a preponderating advantage as should place his employers under a certain disability as to their contracts made with him. It may be said that commerce flourishes best when it is left most untrammeled; but it may also be urged that it is not to the interest of commerce that a common carrier shall be able to lay an embargo on trade at any time, by refusing to transport goods unless under such restrictions of his liability as would hinder reasonable men from giving him employment. It is very true that a common carrier can not compel his customer to enter into a contract relieving him of his common law duties. The former has the right to insist on the carriage of the goods under the common law rules; and if the carrier refuse thus to receive them, he is liable to an action.[1] But this remedy, besides being vexatious and tedious, is one that may have to be applied in every case where the issue is made between the carrier and an employer; and it may well be supposed that in this kind of a contest, the carrier, in the long run, would be able to set the public somewhat at defiance, as but few persons would be disposed to follow up a litigation which would be for the benefit of the public, but which must be prosecuted at their own costs and inconvenience. In most kinds of business, a salutary influence in securing services under conditions that are not oppressive, is brought about by private competition. But in the case of many of the railroads now doing the greater part of the carrying business of the country, competition can

1 Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith 115; Kirby *v.* R. Co., 2 Mo. (App.) 369; Louisville etc. R. Co. *v.* Brownlee, 14 Bush. 590; Southern Ex. Co. *v.* Moon, 39 Miss. 822.

hardly be said to exist; and where it would seem to exist, it is commonly stifled by extensive combinations between rival carriers. In the infancy of the carrying business of England, it was thought to be necessary to prescribe rigid rules for the liability of common carriers, lest they might be tempted to collude with robbers who then infested the country. This reason for these rules can not fairly be said any longer to exist. But the opportunity of the carrier to violate his duties may at present be taken advantage of in many ways. The difficulty of fixing him with proof of intentional injury is as great as ever; and the necessity of resorting to his services, and the importance of a proper performance of his functions, have been immensely enhanced.[1]

§ 139. **Anomalous Doctrines in New York, Illinois and Pennsylvania.**—A few courts have attempted a distinction between the negligence of the carrier and the negligence of his agents and servants. The shipowner, for example, has had his ship constructed by skillful builders; has supplied it with a competent captain, a proper crew and every appliance in the way of security against danger that experience can suggest or has approved. The railroad company has a road bed, rails, ties, engines, cars and other machinery of the best character and description, and has used due

[1] For the arguments in favor of the American rule see the elaborate judgment of Mr. Justice Bradley in Railroad Co. *v.* Lockwood, 17 Wall. 357; and the opinions of Worden, C. J., in Mich. South. R. Co. *v.* Heaton, 37 Ind. 448; 10 Am. Rep. 89; of Nisbet, J., in Fish *v.* Chapman, 2 Ga. 347; 46 Am. Dec. 393; and of the dissenting New York Judges in Smith *v.* R. Co., 24 N. Y. 222; and Stinson *v.* R. Co., 32 N. Y. 333. "The fruits of this rule," says Davis, J., in the latter case, referring to the rule established in New York that carriers may by contract exempt themselves from responsibility for acts of negligence, "are already being gathered in increasing accidents through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts."

care in engaging competent employes. While not permitting the carrier to exempt himself from liability for a loss or injury arising from a failure in these respects,[1] it is well settled in New York that carriers may by special contract exempt themselves from liability for losses arising from any degree of carelessness and negligence on the part of their servants and agents.[2] The

[1] As for example a loss caused by a defective car, Smith *v.* R. Co., 24 N. Y. 222; Knell *v.* U. S. Steam Co., 33 N. Y. (S. C.) 423; Hawkins *v.* R. Co., 17 Mich, 57; 97 Am. Dec. 179; Welsh *v.* R. Co.. 10 Ohio St. 65; 75 Am. Dec. 495; Indianapolis etc. R. Co. *v.* Strain, 81 Ill. 504. In England a stipulation exempting a carrier from liability for injuries caused by a defective car has been held unreasonable and invalid under the statute. McManus *v.* R. Co., 4 H. & N. 327; 5 Jur. (N. S.) 681; Gregory *v.* R. C., 2 H. & C. 944; 10 Jur. (N. S.) 243; and see Tattersall *v.* National Steamship Co., L. R. 12 Q. B. D. 297.

[2] Wilson *v.* R Co., 27 Hun. 149; 97 N. Y. 87; Westcott *v.* Fargo, 63 Barb. 349; 6 Lans. 319; 61 N. Y. 542; Lee *v.* Marsh, 28 How. Pr. 275; 43 Barb. 102; Meyer *v.* Harnden's Express Co., 24 How. Pr. 290; Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith 115; Cragin *v.* R Co., 51 N. Y. 61; 10 Am. Rep. 596; Condict *v.* R. Co., 54 N. Y. 500; Lamb *v.* R. Co., 46 N. Y. 271; Bissell *v.* R. Co., 25 N. Y. 442; 82 Am. Dec. 369; Perkins *v.* R. Co., 24 N. Y. 196; 82 Am. Dec. 18; Wells *v.* R. Co., 24 N. Y. 181; Mynard *v.* R. Co., 71 N. Y. 180; 27 Am. Rep. 28; Steinweg *v.* R. Co., 43 N. Y. 123; 3 Am. Rep. 373; Boswell *v.* R. Co., 5 Bosw. 699; 10 Abb. Pr. 442; French *v.* R. Co., 4 Keyes 108; 2 Abb. App. Dec. 196; Prentice *v.* Decker, 49 Barb. 21; Limburger *v.* Westcott, 49 Barb. 283; Sunderland *v.* Westcott, 2 Sweeny 260; Smith *v.* R. Co., 29 Barb. 132; 24 N. Y. 222; Guillaume *v.* Hamburg etc. Packett Co., 42 N. Y. 212; Nelson *v.* R. Co., 48 N. Y. 498; Nicholas *v.* R. Co., 4 Hun. 327; Knell *v.* United States Steamship Co., 33 N. Y. (S. C.) 423; Nelson *v.* R. Co., 48 N. Y. 498; Holsapple *v.* R. Co., 86 N. Y. 275; Seybolt *v.* R. Co., 95 N. Y. 562; 47 Am. Rep. 75; Steigel *v.* R. Co., 5 Hun. 345. The course of decision in this State on this subject is peculiar. It was at first held in New York that a common crrrier could not restrict his liabilities by any contract in any respect; Gould *v.* Hill, 2 Hill 623; Alexander *v.* Greene, 3 Hill 20. But that doctrine was soon overruled. Parsons *v.* Monteath, 13 Barb. 353 (1851); Moore *v.* Evans, 14 Barb. 524 (1852). After some fluctuations in the decisions caused by the refusal of some of the judges to assent to a rule so unjust to the public, (see Parsons *v.* Monteath, 13 Barb. 353; Dorr *v.* New Jersey Steam Nav. Co., 4 Sandf. 136; 32 Am. Dec. 125; Alexander *v.* Greene, 7 Hill, 533; Wells *v.* Steam Nav. Co., 8 N. Y. 375; Magnin *v.* Dinsmore, 3 J. & S. 182; 6 *Id.* 284; Heineman *v.* R. Co., 31 How. Pr. 430 (1866); Keeney *v.* R. Co., 59 Barb. 104; all of which cases have been modified or overruled,) the settled law in that State is as stated above. But even in New York a special contract is required. Mere notice on the part of the carrier is not sufficient. Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455; Cole *v.* Goodwin, 19 Wend. 251; 32 Am. Dec. 470; Camden etc. Trans. Co. *v.* Belknap, 21 Wend. 354; Clark *v.* Faxton, 26 Wend. 153; Powell *v.* Myers, 26 *Id.* 591; Alexander *v.* Greene, 3 Hill, 9; 7 *Id.* 533; Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485; Westcott *v.* Fargo, 63 Barb. 349, *s. c.*, 6 Lans. 319; Blossom *v.* Dodd, 43 N. Y. 264; Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Nevins *v.* Bay State Steamboat Co., 4 Bosw. 225; Prentice *v.* Decker, 49 Barb. 21; Limburger *v.* Westcott, 49 Barb. 283; Sunderland *v.* Westcott, 2 Sweeny, 260; Slocum *v.* Fairchild, 7 Hill, 292; Madan *v.* Sherard, 10 J. & S. 353; 73 N. Y. 330; Macklin *v.* N. J. Steamboat Co., 7 Abb,

attempt of the New York courts to distinguish between the negligence of the corporation acting through its president and board of directors, and the negligence of its employes, agents or servants, has received little favor in the courts of other States. Such a doctrine applied to a corporation, and carried to its logical result, would secure it against every liability for the neglect of every duty. A corporation can act only by its agents and for those acts in the line of their employment the corporation must be responsible. The "American rule," therefore, rejects this distinction as illogical and unjust,[1] and having no foundation in reason or public policy.[2]

A small number of cases seem to favor permitting a carrier to exempt himself from liability for the ordinary negligence of his servants, while refusing a right to contract for exemption for their gross negligence. In a case decided in Illinois in 1876, it is said: "The doctrine is settled in this court, that railroad companies may, by contract, exempt themselves from liability on account of the negligence of their servants, other than that which is gross or willful."[3] The doctrine referred to, dates from two early cases decided by

Pr. (N. S.) 229; Woodruff *v.* Sherrard, 9 Hun. 322; Rawson *v.* R Co., 2 Abb. Pr. (N. S.) 220; 48 N. Y. 212.

1 See Welsh *v.* R. Co., 10 Ohio St. 65; 75 Am. Dec. 490; Ill. Cent. R. Co. *v.* Read, 37 Ill. 484; 87 Am. Dec. 260.

2 "In the nature of things, every corporation must act solely through its agents, and that their powers and duties may differ in degree, it seems to us, should make no difference, in so far as duties and liabilites to passengers, whether free or paying full fare, are concerned. The true inquiry, at last, is, did the injury result from the negligence of any agent of the corporation, while acting within the scope of his employment? If a corporation may relieve itself from liability to a passenger for the negligence of one or more classes of agents, why may it not for the negligence of another class? All of a corporation's employes, from the highest official to the humblest laborer, are but agents. Some of them are necessarily clothed with extensive powers to make contracts which will bind the corporation in reference to many matters, and to control its operations, while others have but simple labors to perform; yet, none of them are the corporation, clothed with its full power, or responsible for all its acts." Gulf etc. R. Co. *v.* McGowan, 65 Tex. 645.

3 Arnold *v.* R. Co., 83 Ill. 273; 25 Am. Rep. 383.

Mr. Justice Breese, in neither of which was such a ruling necessary.[1] In Alabama and Indiana, this distinction has been made in cases since overruled.[2] It is repudiated even in New York;[3] and is, of course, disregarded by the courts which have adopted the American rule. Carefulness and fidelity are essential duties on the part of common carriers of goods, and carriers of passengers, say the Supreme Court of the United States, and a failure to perform them is negligence, for which the carrier is liable, the distinction between ordinary and gross negligence being unnecessary;[4] for any negligence in such cases may well deserve the epithet of "gross."[5]

1 Ill. Cent. R. Co. *v.* Morrison, 19 Ill. 140 (1857); Ill. Cent. R. Co. *v.* Read, 37 Ill. 484; 87 Am. Dec. 260. In the Morrison case the contract was for the carriage of live stock, and the Court placed its ruling on the ground that "they could not be stored away like inanimate matter, and had the power of locomotion and were exposed to various accidents, the risk of which the company paid the shipper to assume." But as we have seen (*ante*, § 130), a carrier is not at common law, or in the absence of contract, responsible for losses of this kind. In the Read case the suit was for an injury to a passenger who was riding on a free ticket, by the terms of which he assumed all risk of injury from the negligence of the servants and agents of the company. Said Mr. Justice Breese: "While this agreement did not exempt the railroad company from the gross negligence of its employes, we are free to say that it does exempt it from all other species or degrees of negligence not denominated gross or which might have the character of recklessness. For such unavoidable accidents as will happen to the best managed railroad trains, this agreement would be a perfect immunity to the company." But a carrier of passengers is not an insurer, and without any special contract would in no court be held responsible for an "unavoidable accident" which shall happen to "the best managed railroad trains." Subsequent cases in this State recognize the distinction as stated in the Arnold case: Ill. Cent. R. Co. *v.* Adams, 42 Ill. 474; Ill. Cent. R. Co. *v.* Smyser, 38 Ill. 354; Erie R. Co. *v.* Wilcox, 84 Ill. 239; Adams Ex. Co. *v.* Haynes, 42 Ill. 89; West. Tran. Co. *v.* Newhall, 24 Ill. 466; Chicago etc. R. Co. *v.* Hale, 2 Ill. (App.) 150; Ill. Cent. R. Co. *v.* Jute, 13 Ill. (App.) 424; Wabash etc. R. Co. *v.* McCausland, 11 Ill. (App.) 491; Wabash R. Co. *v.* Brown, 39 N. E. Rep. 273, though in others it is evidently overlooked: Boskowitz *v.* Adams Ex. Co., 5 Cent. L. J. 58; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184; 14 Am. Rep. 57. In South Dakota it is said in a late case that in that State a common carrier of property or passengers may limit his liability by an express contract signed by the parties, except as to gross negligence, fraud, or willful wrong of such carrier or his servants. Meuer *v.* R. Co. 59 N. W. Rep. 945.

2 Thayer *v.* R. Co., 22 Ind. 26; Mich. etc. R. Co. *v.* Heaton, 37 Ind. 484; Southern Ex. Co. *v.* Armistead, 50 Ala. 350. Both Indiana and Alabama now follow the American rule; see *ante*, § 137.

3 Cragin *v.* New York Cent. R. Co., 51 N. Y. 61; 10 Am. Rep. 559.

4 Railroad Co. *v.* Lockwood, 18 Wall. 357.

5 Phila. R. Co. *v.* King, 14 How. 468.

In Pennsylvania, a carrier may not contract for exemption from the consequences of his own or his agent's negligence,[1] but he may absolve himself from his insurance liability by a general notice to that effect brought home to his customer.[2] A similar power was given the common carrier in South Carolina[3] until 1872, when the legislature prohibited such notices altogether.[4] The general notice is, however, still permitted in Pennsylvania, though as early as 1848, the doctrine of the earlier cases was criticised by the Supreme Court, which expressed its regret at the necessity of following it,[5] in terms very like those used by Mr. Justice Burrough, thirty years earlier: "I lament that the doctrine of notice was ever introduced into Westminster Hall."[6]

1 Beckman *v.* Shouse, 5 Rawle 179; 28 Am. Dec. 653; Atwood *v.* Reliance Trans. Co., 9 Watts 87; 34 Am. Dec. 503; Camden etc. R. Co. *v.* Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481; Penn. R. Co. *v.* Butler, 57 Pa. St. 335; Penn. R. Co. *v.* Henderson, 51 Pa. St. 315; Penn. R. Co. *v.* McCloskey, 23 Pa. St. 526; Goldey v. R. Co., 30 Pa. St. 242; 72 Am. Dec. 703; Empire Trans. Co. *v.* Wamsutta etc. Oil Co., 63 Pa. St. 14; 3 Am. Rep. 515; Am. Ex. Co. *v.* Sands, 55 Pa. St. 140; Gordon *v.* Little, 8 S. & R. 533; 11 Am. Dec. 632; Ritz *v.* R. Co., 3 Phila. 82; Powell *v.* R. Co., 32 Pa. St. 414; 75 Am. Dec. 564; Lucesco Oil Co. *v.* R. Co., 2 Pitts. Rep. 477; Farnham *v.* R. Co., 55 Pa. St. 53; Am. Ex. Co. *v.* Second Nat. Bk., 69 Pa. St. 394; 8 Am. Rep. 268; Adams Ex. Co. *v.* Sharpless, 77 Pa. St. 516; Grogan v. Adams Ex. Co., 114 Pa. St. 523; 60 Am. Rep. 360; 7 Atl. Rep. 134; Penn. R. Co. *v.* Riordan, 119 Pa. St. 577; 4 Am. St. Rep. 670; 13 Atl. Rep. 324; Buffalo etc. R. Co. *v.* O'Hara, 9 Am. & Eng. R. R. Cas. 321.

2 Laing *v.* Colder, 8 Pa. St. 479; 49 Am. Dec. 533; Beckman *v.* Shouse, *supra;* Bingham *v.* Rogers, 6 W. & S. 495; 40 Am. Dec. 881; Verner *v.* Sweitzer, 32 Pa. St. 208; Penn. R. Co. *v.* Schwarzenberger, 45 Pa. St. 208; 84 Am. Dec. 490; Farnham *v.* R. Co., *supra;* Camden etc. R. Co. *v.* Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481.

3 Porter *v.* Southern Express Co., 4 S. C. 135; 16 Am. Rep. 764; Levy *v.* Southern Ex. Co., 4 S. C. 234; Swindler *v.* Hilliard, 2 Rich. (S. C.) 201; Baker *v.* Brinson, 9 Rich. (S. C.) 201; 67 Am. Dec. 548; Patton *v.* Magrath, Dudl. 159; 31 Am. Dec. 552; Singleton *v.* Hilliard, 1 Strobh. 203.

4 Gen. Stats. s. c. 1872, p. 336. See Piedmont Man. Co. *v.* R. Co., 19 S. C. 353; Wallingford *v.* R. Co., 26 S. C. 258.

5 "The expediency of recognizing in him [the carrier] a right to do so by general notice, such as was given here, has been strongly and justly questioned, and in some of our sister States altogether denied. Were the question an open one in Pennsylvania, I should, for one, unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom in the vast majority of cases he can not but choose to employ." Laing *v.* Colder, 8 Pa. St. 479; 49 Am. Dec. 533.

6 Smith *v.* Horne, Holt. 643 (1818).

§ 140. **Notices Limiting the Carrier's Liability.**—The rule of the English courts, until abrogated by statute,[1] that a common carrier might limit his liability by a general notice to his customers, finds (with a single exception[2]), no support in the American courts. The American rule, while permitting the carrier to restrict his extraordinary responsibility, requires that this shall be done in every case by *a contract*, and that a notice, even though brought home to him, if not assented to by the shipper, will be of no avail.[3]

§ 141. **Distinction between Notices Limiting Liability and Notices of Reasonable Regulations.**—The

1 See *ante*, § 136.

2 Pennsylvania, *ante* § 139.

3 *Federal Courts*—Railroad Co. *v.* Manufacturing Co., 16 Wall. 318; Ayres *v.* Western Co., 14 Blatchf. 9; Seller *v.* The Pacific, 1 Oregon 429; The Pacific, 1 Deady 17; The May Queen, 1 Newb. 465; The Majestic, 60 Fed. Rep. 624. *Alabama.*—South. Ex. Co. *v.* Armstead, 50 Ala. 350; South. Ex. Co. *v.* Crook, 44 Ala. 468; 4 Am. Rep. 140; South. Ex. Co. *v.* Caperton, 44 Ala. 101; 4 Am. Rep. 118. *California*—Cal. Civil Code, §§ 2174, 2175. See Hooper *v.* Wells, 27 Cal. 11; 85 Am. Dec. 211, decided before this provision of the code went into effect. *Connecticut.*—Peck *v.* Weeks, 34 Conn. 145. *Dakota*—Civ. Code, §§ 1258, 1262. *Georgia*—South. Ex. Co. *v.* Newby., 36 Ga. 635; 91 Am. Dec. 783; Purcell *v.* South. Ex. Co., 34 Ga. 315; Mosher *v.* South. Ex. Co., 38 Ga. 37; Wallace *v.* Matthews, 39 Ga. 17; Wallace *v.* Saunders, 42 Ga. 486; Georgia R. Co. *v.* Gann, 68 Ga. 350; Central R. Co. *v.* Dwight Man. Co., 75 Ga. 607; Georgia R. Co. *v.* Spears, 66 Ga. 485; 42 Am. Rep. 81; Central R. Co. *v.* Bryant, 73 Ga. 722. *Illinois.*—West. Trans. Co. *v.* Newhall, 24 Ill. 466; Ill. Cent. R. Co., *v.* Frankenburg, 54 Ill. 88; Merchants' etc. Trans. Co. *v.* Leysor, 89 Ill. 43; Merchants' etc. Trans. Co. *v.* Jaesting, 89 Ill. 152; Western Trans. Co. *v.* Hosking, 19 Ill. (App.) 607; Ill. Cent. R. Co. *v.* Jonte, 13 Ill. (App.) 428. *Indiana*—Ind. Cincinnati etc. R. Co., *v.* Cox, 29 Ind. 360; 95 Am. Dec. 640; Evansville etc. R. Co. *v.* Young, 28 Ind. 516; *Iowa.*—Stat. of 1866 c. 13, p. 121; Code §1307. *Kentucky.*—Louisville etc. R. Co. *v.* Hedger, 9 Bush. 645; Adams Ex. Co. *v.* Nock., 2 Duv. 512; Louisville etc. R. Co. *v.* Brownlee, 14 Bush, 5911. *Maine.*—See cases under sec. 137. *Maryland*—McCoy *v.* Erie Trans. Co., 42 Md. 498. *Massachusetts.*—See cases under § 137. *Michigan*—See cases in § 137. *Minnesota.*—See cases § 137. *Mississippi.*—Mobile etc. R. Co. *v.* Weiner, 49 Miss. 725; New Orleans etc. R. Co. *v.* Faler, 58 Miss. 911. *Missouri.*—Levering *v.* Union Trans. Co., 42 Mo. 88; 97 Am. Dec. 320. *New Hampshire.*—Bennett *v.* Dutton, 10 N. H. 481; Moses *v.* R. Co., 24 N. H. 71; 55 Am. Dec. 222; 32 N. H. 523; 64 Am. Dec. 381. *New Mexico.*—See Seligman *v.* Armijo, 1 N. Mex. 459. *New York.*—Hollister *v.* Nowlen, 19 Wend. 234; Dorr *v.* N. J. Nav. Co., 11 N. Y. 488. *North Carolina.*—Smith *v.* R. Co., 64 N. C. 235; Williams *v.* Branson, 1 Murphy, 417. *Ohio.*—Union Mut. Ins. Co. *v.* R. Co., 1 Disney, 480; Jones *v.* Voorhees, 10 Ohio, 145; Davidson *v.* Graham, 2 Ohio St. 131 and cases cited in § 137. *Tennessee.*—Walker *v.* Skipwith, Meigs 502; 33 Am. Dec. 161. *Texas.*—Mo. etc. R. Co. *v.* Carter, 29 S. W. Rep. 565. *Vermont.*—See cases, *ante* § 137. *Virginia.*—See cases, *ante* § 137. *West Virginia.*—See cases, *ante* § 137. *Wisconsin.*—See cases, *ante* § 137.

American rule, however, recognizes a well settled distinction between notices which seek to limit the liability of the carrier, and notices whose object is to obtain from the shipper information which he (the carrier), has a right to require. Though contained in the same paper, they are severable, and the one may be rejected, and the other enforced.[1]

§ 142. **Notice as to Value and Character of Goods.** —Notices of the latter class have regard, generally, to the value and character of the goods. It was early held in England, that the liability of a carrier being founded on his reward,[2] he was entitled to give notice that he would not be answerable for goods of a costly character or above a certain sum unless he was informed of their value, for he had a right to accommodate his charges to the value of the property committed to his care.[3] The law on this point, is the same in this country, although the American courts place the justice of this exception more on the ground of the right of the carrier to have this kind of information, and the fraud practiced upon him in withholding it, than on the English argument as to the consideration. Where the shipper knows that the carrier demands, and has a right to demand, information concerning the value of his goods, silence on his part is the same as an assertion that his goods are of no greater value than that suggested by the carrier. The carrier is thereby not only deprived of his adequate reward, but is misled as to

1 Oppenheimer *v.* U. S. Ex. Co., 69 Ill. 62; 18 Am. Rep. 596; Moses *v.* R. Co., 24 N. H. 71; 55 Am. Dec. 222; The Majestic, 60 Fed. Rep. 624; see Burroughs *v.* R. Co., 100 Mass. 120.

2 "His warranty and insurance is in respect to the reward he is to receive; and the reward ought to be proportionable to the risk." Mansfield, C. J., in Gibbon *v.* Paynton, 4 Burr. 2278 (1769). "'Tis the reward that makes the carrier answerable." Holt, C. J., in Tyly *v.* Morrice, Carth. 485 (1699). "The true principle of a carrier's being answerable is the reward." Aston, J., in Gibbon *v.* Paynton, *supra.*

3 Batson *v.* Donovan, 4 B. and Ald. 21.

the degree of care and diligence which he should exercise.[1] Thus, a notice by the carrier that he will not be liable for a greater amount than $50 or $100 or any other sum on any article, package or property, unless the true value is given,[2] (in which case he will have the right to increase his charges), or that he will not be liable beyond the invoice or declared value of the goods,[3] or only for their value at the place and time of shipment,[4] is valid and binding on the shipper, provided it was brought to his knowledge.

If the carrier notifies the shipper that he will not be liable for any article of more than a certain value unless specially entered as such, and paid for accordingly, and these conditions are not complied with, the owner cannot recover anything—not even the smaller value excluded in the notice.[5] But where the terms of the notice are that the carrier will not be liable beyond a certain sum, that sum may be recovered in any event.[6]

1 Cole *v.* Goodwin, 19 Wend. 251; 32 Am. Dec. 470; McMillan *v.* R. Co., 16 Mich. 79; 93 Am. Dec. 208; Moses *v.* R. Co., 24 N. H. 71; 55 Am. Dec. 222; Fish *v.* Chapman, 2 Ga. 349; 46 Am. Dec. 393; Western Trans. Co. *v.* Newhall, 24 Ill. 466; 76 Am. Dec. 760; Judson *v.* R. Co., 6 Allen, 485; 38 Am. Dec. 646; Kallman *v.* United States Exp. Co., 3 Kan. 205; Farmers' Bank *v.* Champlain Trans. Co., 23 Vt. 186; 56 Am. Dec. 68; Magnin *v.* Dinsmore, 62 N. Y. 35; 19 Am. Rep. 442; Lawrence *v.* R. Co., 36 Conn. 63; Fibel *v.* Livingston, 64 Barb. 179; The May Queen, 1 Newb. Adm. 465; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Hopkins *v.* Westcott, 6 Blatchf. 64; Oppenheimer *v.* U. S. Exp. Co., 69 Ill. 62; 18 Am. Rep. 596; Graves *v.* R. Co., 137 Mass. 33; 50 Am. Rep. 282; The Bermuda, 23 Fed. Rep. 379; Mather *v.* Am. Ex. Co., 2 Fed. Rep. 49; Smith *v.* R. Co., 64 N. C. 235; Williams *v.* Branson, 1 Murphy, 417; Brehme *v.* Adams Ex. Co., 25 Md. 328; South. etc. R. Co. *v.* Henlein, 52 Ala. 606; *aliter* in Iowa under its statute: Hart *v.* R. Co., 69 Ia. 485; McClure *v.* R. Co., 52 Ia. 600.

2 Moses *v.* R. Co., 24 N. H. 71; 55 Am. Dec. 222; Dana *v.* R. Co., 50 How. Pr. 428; Texas etc. R. Co. *v.* Caldwell, 3 Tex. Civ. Cas. 437; St. Louis etc. R. Co. *v.* Lesser, 46 Ark. 236; St. Louis etc. R. Co., *v.* Weakly, 50 Ark. 397, 8 S. W. Rep. 134 and cases cited in former note.

3 The Lydian Monarch, 23 Fed. Rep. 298; The Hadji, 18 Fed. Rep. 459.

4 Louisville etc. R. Co. *v.* Oden, 80 Ala. 38; Chicago etc. R. Co. *v.* Harmon, 17 Ill. (App.) 640.

5 Izett *v.* Mountain, 4 East 371; Nicholson *v.* Willan, 5 East 507; Yate *v.* Willan, 2 East 128; Clay *v.* Willan, 1 H. Black 298; Batson *v.* Donovan, 4 Barn. & Ald. 21; Harris *v.* Packwood, 3 Taunt. 264; Baldwin *v.* Collins, 9 Rob. 468.

6 Clarke *v.* Gray, 6 East 564; Hart *v.* R. Co., 2 McCrary 232.

It is held in a number of cases, that notwithstanding the limitation as to value, the carrier is still responsible for the full value of the property if it is lost through negligence—in other words, that the notice, or even a contract between the parties, in reference to the value, can not extend beyond the insurance liability of the carrier.[1] But in most, if not all of these cases, the valuation inserted in the contract was put there by the carrier in accordance with his own custom or regulation, and without reference to the real value of the property transported; or the shipper was forced to agree to a false valuation;[2] or there were no higher rates charged for property above the valuation.[3]

[1] Alabama etc. R. Co. *v.* Little, 71 Ala. 611; Mobile etc. R. Co. *v.* Hopkins, 41 Ala. 486; 94 Am. Dec. 607; South. etc. R. Co. *v.* Henlein, 52 Ala. 606; 56 Ala. 368; Overland Mail Co. *v.* Carroll, 7 Colo. 43; 1 Pac. Rep 682; Oppenheimer *v.* U. S. Ex. Co., 69 Ill. 62; 18 Am. Rep. 596; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184; 14 Am. Rep. 57; Kansas City R. Co. *v.* Simpson, 30 Kas. 645; 46 Am. Rep. 104; 2 Pac. Rep. 821; Kallman *v.* U. S. Ex. Co., 3 Kas. 205; Orndorff *v.* Adams Ex. Co., 3 Bush. 194; 96 Am. Dec. 207; Moulton *v.* R. Co., 31 Minn. 85; 47 Am. Rep. 781; 16 N. W. Rep. 497; Chicago etc. R. Co. *v.* Abels; 60 Miss. 1017; South. Ex. Co. *v.* Moon, 39 Miss. 822; Westcott *v.* Fargo, 61 N. Y. 524; 19 Am. Rep. 300; Westcott *v.* Fargo, 63 Barb. 349; 6 Lans. 319; U. S. Ex. Co. *v.* Bach man, 28 Ohio St. 144; American Ex. Co. *v.* Sands, 55 Pa. St. 140; Adams Ex. Co. *v.* Holmes, 9 Atl. Rep. 166 (Pa.); Grogan *v.* Adams Ex. Co., 114 Pa. St. 528; 7 Alt. Rep. 134 (which must be considered as overruling the earlier cases of Farnham *v.* R. Co., 55 Pa. St. 53; Elkins *v.* Trans. Co., 81 Pa. St. 315; Newberger *v.* Howard, 6 Phila. 174); Coward *v.* R. Co., 16 Lea. 225; 57 Am. Rep. 226; South. etc. R. Co. *v.* Maddox, 12. S. W. Rep. 815; Black *v.* Trans. Co., 55 Wis. 319; 42 Am. Rep. 713; 13 N. W. Rep. 244.

[2] Kansas City etc. R. Co. *v.* Simpson, *supra.* East Tenn. R. Co. *v.* Johnson, 11 S. E. Rep. 809 (Tenn.).

[3] In McFadden *v.* R. Co., 92 Mo. 343; 4 S. W. Rep. 689, the Court say: "On the one hand it may be unjust, unreasonable and repugnant to sound principles of fair dealing for the shipper to reap the benefits of a contract by which he secures a lower rate than the carrier might reasonably charge for the service rendered if there be no loss and to repudiate it in case of loss. Where the sh pper procures the lawful rates of the carrier to be reduced in express consideration of the agreed value upon which the compensation is based he is under numerous authorities some of which are cited held to be estopped to say the value is greater when the loss occurs. On the other hand it would, we think, be no less unfair, unreasonable and unjust that the carrier without any sacrifice of his interest or lawful demands or diminution of his lawful charges, should secure without consideration therefor such important advantages and release of liabilities to which he would otherwise be subjected under the law." * * * "In the case now before us there was no pretense that the plaintiff or his agent fraudulently concealed or falsely represented the real value of the mules. They were delivered without any inquiry or repre-

Where there is no advantage taken of the shipper who represents or agrees that the goods delivered are of a certain value, and the carrier, for this reason gives a reduced rate, the former is estopped from proving a greater value, even where they have been destroyed through the carrier's negligence. Such is the rule in the Supreme Court of the United States, of Massachusetts and elsewhere. Although one of the indirect effects of such an agreement is to limit the responsibility of the carrier for the negligence of his servants, this is not its purpose. It does not induce want of care, but simply exacts from the carrier the measure of care due to the value agreed upon.[1] But on the other hand, where there is no value agreed upon, a stipulation that the liability of the carrier shall not exceed a certain

sentations as to value. They may have been a somewhat choice lot of mules, but they were not of extraordinary or fanciful value such as blooded stock or on account of speed or other qualities as in the Harvey case and there is no pretense that defendant was in any way deceived as to their value or mislead as to the degree of care they would require. On the other hand the recital that the given rate was a reduced rate was in fact false as was shown by the evidence of the station agent who testified it was the usual rate charged all shippers. If in the one case it is competent for the carrier to show that the real value of the property was concealed and the lower rate thus secured by the fraud or deceit of the shipper, why may not the shipper be permitted to show that the alleged reduced rate in consideration of which he surrendered the obligation imposed by law upon the carrier as an insurer of the property was false and in fact no reduced rate at all. It may be that plaintiff was not deceived by it at the time as he did not ask for or suppose he was getting a reduced rate, but if the pretended lower rate was the usual rate and known to be such to both parties it would work a fraud upon the rights of plaintiff under the law if the defendant were permitted to treat it as a lower rate and to thus deprive plaintiff of important rights and thus secure release of part of its liability by reason thereof. Under the circumstances of this case there was we think no consideration for the limited valuation placed upon the mules by defendant and the stipulation in that respect is we think void as releasing the carrier from the full and reasonably adequate liability for its negligence."

[1] Hart *v.* R. Co., 112 U. S. 331; 2 McCrary, 333; Muser *v.* Holland, 17 Blatchf. 412; Hopkins *v.* Westcott, 6 Blatchf. 64; Earnest *v.* Ex. Co., 1 Woods, 573; The Alene, 25 Fed. Rep. 862; The Hadji, 18 Fed. Rep. 459; The Lydean Monarch, 23 Fed. Rep. 298; Graves *v.* R. Co., 137 Mass. 33; 50 Am. Rep. 282; Hill *v.* R. Co., 144 Mass. 284; 10 N. E. Rep. 836; Squire *v.* R. Co., 98 Mass. 239; Louisville etc. R. Co. *v.* Oden., 80 Ala. 38; Louisville etc. R. Co. *v.* Sherrod, 84 Ala. 178; 4 South Rep. 80; Harvey *v.* R. Co., 74 Mo. 538; Brown *v.* R. Co., 18 Mo. (App.) 568; Rosenfeld *v.* R. Co., 103 Ind. 121; 53 Am. Rep. 500; 2 N. E. Rep. 344.

amount, will have no effect upon a negligent loss or injury.[1]

§ 143. **Methods of Giving Notice. — Advertisements and Placards.** —Though it may sometimes be possible to charge the customer with knowledge of a notice published by the carrier in a newspaper, yet in the large majority of cases, it would be so difficult that it has been seldom attempted in the courts. The reason is, that there is no presumption that even a subscriber to a newspaper reads all of its contents.[2] Neither are notices placed upon posted placards or

1 Abrams *v.* R. Co. 58 N. W. Rep. 780 (Wis.) the court saying: "The court refused to allow the plaintiff to take judgment for the value of the horses as found by the verdict. In doing so the court gave effect to the clause of the contract wherein it was agreed that the liability of the company should not in any event exceed $100 per head. It will be observed that that amount is not named as the value of each horse, and the contract contains no stipulation nor agreement as to the value of the horses, or any of them. In Hart *v.* R. Co., 112 U. S. 331, 5 Sup. Ct. Rep. 151, the plaintiff's recovery was limited to his "agreed valuation" in the contract. The same was true in Graves *v.* R. Co., 137 Mass. 33, where it was held "that the shipper was estopped to claim more than the agreed valuation of the goods." To the same effect: Hill *v.* R. Co., 144 Mass. 286, 10 N. E. Rep. 836; Brown *v.* Steamship Co., 147 Mass. 58, 16 N. E. Rep. 717; Alair *v.* Railroad Co., (Minn.) 54 N. W. Rep. 1073. But where, as here, there is an absence of any agreed valuation in the contract, and the limitation is merely as to the amount of recovery for damages caused by the defendant's negligence, the case comes within the general rule to the effect that the company cannot contract for exemption, either in whole or in part, from liability for the negligence of itself or its employes. Id.; Boehl *v.* R. Co., 44 Minn. 191, 46 N. W. Rep. 333; McFadden *v.* R. Co., 92 Mo. 344, 4 S. W. Rep. 689; Weiller *v.* R. Co., 134 Pa. St. 310; 19 Atl. Rep. 702; Ashendon *v.* R. Co., 5 Exch. Div. 190, 31 Moak, Eng. Rep. 644; Dickson *v.* R. Co., 18 Q. B. Div. 176. This is in harmony with the rule held in Black *v.* Trans. Co., 55 Wis. 319; 13 N. W. Rep. 244. It is to be remembered that the shipper and the railroad do not contract upon equal terms. Practically the shipper is bound to submit to whatever conditions are exacted by the carrier. To be lawful, such conditions must be reasonable. A contract relieving a carrier wholly or partially from liability for damage caused by its own negligence is unreasonable. We must hold that the plaintiff was entitled to judgment for the amount of his verdict."

2 Munn *v.* Barker, 2 Stark. 255; Riley *v.* Horne, 3 Bing. 2; Judson *v.* R. Co., 6 Allen, 485; Mich. Cent. R. Co. *v.* Hale, 6 Mich. 243; Baldwin *v.* Collins, 9 Rob. 468; Barney *v.* Prentiss, 4 H. & J. 317; 7 Am. Dec. 670. In Baldwin *v.* Collins, it is said: "The mere publication of a notice in one or more newspapers, no matter how long the time, of an intention not to be responsible for particular articles, unless upon disclosure of contents and value, is not sufficient to release the carrier from responsibility. The notice must be brought home to the shipper or depositor. The circumstance of its being published in several newspapers is one fact; that the party was a regular subscriber to and reader of one or more of those papers is another fact."

signs of much more value.[1] It does not follow that a man who sees a sign reads what is upon it,[2] or that because notices are posted conspicuously in stations, in cars and upon boats, persons, though being in those places, read them,[3] or though they read some of them, that they read them all.[4]

§ 144. **Notices in Receipts and other Vouchers.**— The unfriendliness of the English courts to notices by advertisement and placard having, as we have seen, early become manifest, the carrier had recourse to other means. In 1828 Chief Justice Best suggested that if carriers would but deliver to their customers at the time of receiving their goods, written memoranda of the terms on which they would carry, the vexed question of notices would be ended.[5] The same opinion had been expressed by the Court of Common Pleas in 1825,[6] and by Lord Ellenborough, in 1817,[7] who said that in this way the difficulty of proving knowledge of the notice would be removed, Bailey, J., adding, that if a carrier never took in a parcel without

[1] Brooke *v.* Pickwick, 4 Bing. 218; Drayson *v.* Horne, 27 W. R. 793; Clayton *v.* Hunt, 2 Camp. 17; Butler *v.* Hearne, 2 Camp. 415.

[2] In Kerr *v.* Willan, 6 M. & S. 50; 2 Stark. 53, in order to affect the plaintiff with knowledge of a notice limiting the carrier's liability, it was proved that it was painted on a board and hung up in the defendant's office. The plaintiff's servant testified that he had taken goods to the office, had frequently been there before, and had seen the board, but that he did not suppose there was anything upon it; that although he could read, he had never in fact read the notice until after the loss. Lord Ellenborough said: "You cannot make this notice to this non-supposing person."

[3] Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 415; Macklin *v.* New Jersey Steam. Co., 7 Abb. Pr. (U. S.) 229; Gleason *v.* Goodrich Trans. Co., 32 Wis. 85; Lake Shore etc. R. Co. *v.* Greenwood, 79 Pa. St. 373; Cantling *v.* R. Co., 54 Mo. 385; 14 Am. Rep. 476; Peck *v.* Weeks, 34 Conn. 145; Walker *v.* Jackson, 10 M. & W. 161; Balt. etc. R. Co. *v.* Brady, 32 Md. 333.

[4] There was posted up in a car notices limiting the company's liability for passengers' baggage and as to smoking in the cars, standing on the platforms, and putting heads and arms out of the windows. The plaintiff, a passenger in the car, admitted that he had read the notice as to smoking and standing on the platform. It was held that there was no presumption that he had seen the notice as to baggage. Malone *v.* R. Co., 12 Gray 388; 74 Am. Dec. 598.

[5] Riley *v.* Horne, 5 Bing. 217.

[6] Rowley *v.* Horne, 3 Bing. 2.

[7] Kerr *v.* Willan, 6 M. & S. 150; 2 Stark. 53.

a receipt, he would be secure. The English carrier was not slow in acting upon these suggestions, and nearly all the American cases where notices of this character have been sustained, find the notice contained in a bill of lading, a printed receipt, a check, or a ticket.[1] Courts and juries are liberal in inferring knowledge on the part of shippers and customers from the receipt by them, without objection, of vouchers of this character.[2]

§ 145. **Notice Assented to Constitutes a Contract.** —Notices of the character just spoken of, bind the customer, provided only that it be shown that they were brought to his knowledge. But as a notice of limited liability is regarded as a proposal for a contract which the shipper may accept or reject, it follows that a notice by a carrier to a shipper that he will not be responsible as an insurer, if assented to by the latter, becomes binding upon him, for it amounts to a *contract*, which is all that the American rule requires.[3]

§ 146. **Assent not Inferred from Mere Knowledge.** —The assent will not be inferred from the fact that knowledge of such notice on the part of an owner or consignor of goods is shown. The evidence must go farther and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered.[4]

1 Shelton *v.* R. Co., 59 N. Y. 258; 36 N. Y. (S. C.) 527.

2 Oppenheimer *v.* U. S. Ex. Co., 69 Ill. 62.

3 Blumenthal *v.* Brainerd, 38 Vt. 402.

4 Buckland *v.* Adams Ex. Co., 97 Mass. 124; Moses *v.* R. Co., 24 N. H. 71; McMillan *v.* R. Co., 16 Mich. 70; Mann *v.* Birchard, 40 Vt. 226; Bean *v.* Green, 12 Me. 422; Sager *v.* R. Co., 31 Me. 228; Fillebrown *v.* R. Co., 55 Me. 462; Little *v.* R. Co., 66 Me. 239; Mobile etc. R. Co. *v.* Weiner, 49 Miss. 725; Western Trans. Co. *v.* Newhall, 24 Ill. 466; Blumenthal *v.* Brainerd, 28 Vt. 247; Farmers' etc. Bank *v.* Champlain Trans. Co, 18 Vt. 131; 23 Vt. 186.

If a person, after seeing a notice that the carrier receives goods only on certain terms limiting his liability delivers them to be carried, is this an implied assent on the part of the shipper to the terms of the notice? The answer is, that it is not. The owner has a right to insist, notwithstanding the notice, that the carrier shall take the goods under his common law responsibility, for the carrier is under a legal obligation to receive and convey the goods safely. Under such circumstances, the presumption is stronger that the shipper intends to insist on his legal rights, than that he was willing to yield to the wishes of the carrier. If a coat be ordered from a tailor after he has given the customer notice that he will not furnish such an article at less than $100, the assent of the customer to pay that price would be implied; but if the tailor had been under a legal obligation to furnish coats at $50, no such implication would arise.[1]

§ 147. **Accepting Papers Containing Limitations or Conditions.**—Where conditions or limitations are contained *in* a paper, which paper is accepted as the contract between carrier and shipper, such conditions or limitations are presumed to be agreed to by the shipper, from the very fact that he accepts it without dissent;[2] and he is bound by them, even although he did not read them.[3] And whether the paper must be

1 Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455.

2 "Where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract without objection, is commonly conclusive." Cooley, J., in McMillan *v.* R. Co., 16 Mich. 79.

3 Kirkland *v.* Dinsmore, 62 N. Y. 171, reversing 4 T. & C. 304; Grace *v.* Adams, 100 Mass. 505; Hoadley *v.* North. Trans. Co., 115 Mass. 304; Hill *v.* R. Co., 73 N. Y. 351; 29 Am. Rep. 163; Germania Fire Ins. Co. *v.* R. Co., 72 N. Y. 90; Boylan *v.* R. Co., 10 S. C. Rep. 50; Snider *v.* Adams Ex. Co., 63, Mo. 376; Mulligan *v.* R. Co., 36 Ia. 181; St. Louis etc. R. Co. *v.* Weakley, 50 Ark. 597; 8 S. W. Rep. 134; Morrison *v.* Construction Co., 44 Wis. 405; 28 Am. Rep. 599; Davis *v.* R. Co., 29 Atl. Rep. 313 (Vt.).

considered in law as being understood by both parties as containing the contract between them, depends upon its form and customary use.[1]

§ 148. **Bills of Lading.** — In the maritime law, the bill of lading was always regarded by the courts as the contract between the parties, and the shipper, by accepting it, was conclusively presumed to assent to its conditions, because the usages of business would naturally lead him to infer that the document which was his muniment of title, *quasi* negotiable, and on the faith of which he might borrow money, was a contract and not a mere receipt.[2] The inland bills of lading now customarily issued by railroads, are of the same character, and it is well established that persons receiving them are bound to know that they contain the terms on which their property is agreed to be carried; and their acceptance is sufficient evidence of assent to their terms.[3]

1 "The real distinction is this: If the paper delivered to the shipper by the carrier contains the terms of the contract between them and is accepted by the shipper, it is conclusive evidence of the contract in the absence of fraud or mutual mistake. But if it is a notice only and does not purport to be a contract or does not contain language sufficient to constitute a contract it is no more than a parol statement, and proof must be given of actual assent by the shipper to its terms." Wheeler Carr., § 231.

2 Wheel. Carr., 222.

3 McMillan *v.* R. Co., 16 Mich. 79; 93 Am. Dec. 208; Boorman *v.* Ex. Co., 21 Wis. 152; Detroit R. Co. *v.* Bank, 20 Wis. 127; Strohn *v.* R. Co., 21 Wis. 554. (These cases practically overrule the earlier cases of The Sultana *v.* Chapman, 5 Wis. 454; Falvey *v.* North. Trans. Co., 15 Wis. 129.) Lake *v.* Hurd, 38 Conn. 536; Lawrence *v.* R. Co., 36 Conn. 63; The Emily *v.* Carney, 5 Kas. 645; McCoy *v.* Erie etc. Trans. Co., 42 Md. 498; Maghee *v.* R. Co., 45 N. Y. 514; May *v.* Babcock, 4 Ohio. 334; Cincinnati etc. R. Co. *v.* Pontius, 19 Ohio St. 221; Lawrence *v.* McGregor, Wright 193; Adams Express Co. *v.* Sharpless, 77 Pa. St. 516; Colton *v.* R. Co., 67 Pa. St. 211; Farnham *v.* R. Co., 55 Pa. St. 53; Logan *v.* Mobile Trade Co., 46 Ala. 514; Am. Ex. Co. *v.* Second Nat. Bk., 69 Pa. St. 394; Wertheimer *v.* R. Co., 17 Blatchf. 411; Whitehead *v.* R. Co., 87 N. C. 225; Tex. etc. R. Co. *v.* Scrivener, 2 Tex. (App.) Cas. 328; Blossom *v.* Dodd, 43 N. Y. 264; Mueller *v.* R. Co., 2 Cin. Rep. 280; Long *v.* R. Co., 50 N. Y. 76; Strohn *v.* R. Co., 21 Wis. 554; 94 Am. Dec. 564; St. Louis etc. R. Co. *v.* Cleary, 77 Mo. 634; 46 Am. Rep. 13; McFadden *v.* R. Co., 92 Mo. 343; 1 Am. St. Rep. 721; Brown *v.* R. Co., 18 Mo. (App.) 568; Hutchinson *v.* R. Co., 37 Minn. 524; Hoadley *v.* Northern Trans. Co., 115 Mass. 304; 15 Am. Rep. 106; Steele *v.* Townsend, 37 Ala. 247; 79 Am. Dec. 49; Taylor *v.* R. Co., 22 Ark. 393; 29 Am. Rep. 1; Mulligan *v.* R.

§ 149. **Express Receipts.** — Until recent years, it was not the general practice of expressmen to deliver to the shipper, on their receiving articles for carriage, anything more than a mere receipt therefor, specifying the goods shipped, the names of the consignor and consignee, and the place of delivery. When in individual cases they undertook to add limitations and conditions to these receipts, it was held that it was necessary to prove the shipper's assent thereto, and that it was competent for him to show that he did not read the paper, nor understand its purport, but that he believed it to be a mere receipt.[1] But the practice having now become general in the case of the great express companies of the country, for them to deliver to the shipper a receipt in the form of a bill of lading, it will be found that where this is shown, the courts apply the rule as to other bills of lading, and hold that they constitute contracts whose terms are binding on the parties upon their being received without objection.[2]

Co., 36 Iowa, 180; 14 Am. Rep. 514; Robinson *v.* Merchants' Dispatch Trans. Co., 45 Iowa, 470; Blossom *v.* Dodd, 43 N. Y. 264; Steinweg *v.* R. Co., 43 N. Y. 123; 3 Am. Rep. 673; Germania Fire Ins. Co. *v.* R. Co., 72 N. Y. 90; 28 Am. Rep. 113; Phifer *v.* R. Co., 89 N. C. 311; 45 Am. Rep. 687; Louisville etc. R. Co. *v.* Brownlee, 14 Bush, 590; Dillard *v.* R. Co., 2 Lea, 288; Merchants' Dispatch Trans. Co. *v.* Bloch, 86 Tenn. 392; 6 Am. St. Rep. 847; 6 S. W. Rep. 881. *Contra* in Illinois, both as to bills of lading and express receipts: Erie Trans Co. *v.* Dater, 91 Ill. 195; 33 Am. Rep. 51; Merchants' etc. Co. *v.* Theilbar, 86 Ill. 71; Adams Express Co. *v.* King, 3 Ill. App. 316; Merchants' Trans. Co. *v.* Leysor, 89 Ill. 43; Merchants' Trans. Co. *v.* Jaesting, 89 Ill. 152; Field *v.* R. Co., 71 Ill. 458.

1 Wheeler Carr. § 225; Adams Ex. Co. *v.* Noch, 2 Duv. 562; 87 Am. Dec. 510; Southern Ex. Co. *v.* Newby, 36 Ga. 635; 91 Am. Dec. 783; Woodruff *v.* Sherrard, 9 Hun. 322; Kember *v.* Express Co., 22 La. Am. 158; 2 Am. Rep, 719.

2 Grace *v.* Adams, 100 Mass. 505; 97 Am. Dec. 117; Huntingdon *v.* Dinsmore, 6 Thomp. & C. 195; 4 Hun. 66; Brehme *v.* Adams Express Co., 25 Md. 328; Kirkland *v.* Dinsmore, 62 N. Y. 171; 20 Am. Rep. 475; Belger *v.* Dinsmore, 51 N. Y. 166; 10 Am. Rep. 575; Snider *v.* Adams Ex. Co., 63 Mo. 376; Collender *v.* Dinsmore, 55 N. Y. 200; Magnin *v.* Dinsmore, 56 N. Y. 168; Boorman *v.* Am. Ex. Co., 21 Wis. 152; Ghormley *v.* Dinsmore, 53 N. Y. S. C. 36; Westcott *v.* Fargo, 61 N. Y. 542; 19 Am. Rep. 300; Gibson *v.* Am. Ex. Co., 1 Hun, 387; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184; Adams Ex. Co. *v.* Haynes, 42 Ill. 89; Adams Ex. Co. *v.* Schier, 55 Ill. 140; Western Trans. Co. *v.* Hosking, 19 Ill. (App.) 606; Phœnix Ins. Co. *v.* West. Trans. Co., 10 Biss. 29; Adams Ex. Co. *v.* King, 3 Ill. (App.) 316; Lake Shore etc. R. Co. *v.* Davis, 16 Ill. (App.) 425. But in Illinois by statute a carrier is forbidden to limit his liability "by any stipulation or limitation expressed in the receipt given for the

§ 150. **Baggage Checks.**—The courts have steadily refused to baggage receipts or checks, the standing which bills of lading have been able to obtain.[1] In a well considered case in New York,[2] a baggageman came into the car where plaintiff was, to whom he gave up his railroad check, and received a printed receipt without knowing anything of its contents, which he folded and put in his pocket without reading. On the receipt was printed "Domestic bill of lading," and it purported to be a contract relieving the carrier from liability beyond $100 in certain specified cases, among others a loss or detention through his negligence, unless the baggage was specially insured. It was held that the plaintiff was not bound by the limitation. "No court," said Curtis, C. J., "holds that a traveler receiving a receipt of this nature, and under like circumstances where it is impossible to read it, and no intimation is given him of its embracing a contract, is bound by such contract. Besides, there are intrinsic difficulties in extending any such immunity from liability to parties engaged in the porterage of travelers' baggage at night in large communities. The printing near the commencement of the receipt the words 'Domestic bill of lading,' does not obviate the distinction drawn in the cases above referred to, though possibly so intended;" and Andrews, J., said: "The plaintiff, on receiving the paper had, from the nature and circum-

property." Nevertheless a receipt signed by the shipper or his agent (Illinois etc. R. Co. *v.* Jonte, 13 Ill. (App.) 428) or assented to and accepted as such by the shipper (Merchants' Trans. Co. *v.* Jaesting, 87 Ill. 152; Merchants' Trans. Co. *v.* Leysor, 89 Ill. 89) becomes a binding contract. In Dakota by statute the shipper's assent can be manifested only by his signature. Hartwell *v.* North. Pac. Ex. Co., 41 N. W. Rep. 732. And a similar statute is in force in Michigan. Feige *v.* R. Co., 62 Mich, 1.

1 Blossom *v.* Dodd, 43 N. Y.; 3 Am. Rep. 701; Woodruff *v.* Sherrard, 9 Hun. 322; Prentice *v.* Decker, 49 Barb. 21; Limburger *v.* Westcott, 49 Barb. 283; Sutherland *v.* Westcott, 2 Sweeney 260; Isaacson *v.* R. Co., 94 N. Y. 278; 46 Am. Rep. 642.

2 Madan *v.* Sherard, 10 J. & S. 353; 73 N. Y. 329; 29 Am. Rep. 153.

stances of the transaction, a right to regard it as designed simply as a voucher to enable him to follow and identify his property; and if he had no notice that it was intended to subserve any other purpose, or that it embodied the terms of a special contract, his omission to read it was not *per se* negligence. When a contract is required to be in writing, and a party receives a paper as a contract, or when he knows or has reason to suppose that a paper delivered to him contains the terms of a special contract, he is bound to acquaint himself with its contents, and if he accepts and retains it, he will be bound by it, although he did not read it. But this rule cannot, for the reasons stated, be applied to this case, and the court properly refused to charge as matter of law, that the delivery of the receipt created a contract for the carriage of the trunk under its terms." So, a printed limitation on the back of a metal check for baggage that the carrier will not be bound over one hundred dollars in case of loss, is not binding on the passenger unless his express assent to the limitation is shown—the mere receipt of the check is no evidence of such assent.[1]

§ 151. **Requisites to Validity of Such Notices.**—But there are several requisites to the legal validity of such notices, whether as mere notices, which are valid without assent,[2] or as proposals which become contracts by being agreed to. What these requisites are will be shown in the next six sections:

§ 152. **There Must be no Mistake.**—Any mistake, whose effect would be to prevent the formation of the contract may be shown by the shipper.[3] The

[1] Indianapolis etc. R. Co. *v.* Cox, 29 Ind. 360.

[2] *Ante* § 141.

[3] Boskowitz *v.* Adams Ex. Co., 9 Cent. L. J. 389; Mehrbach *v.* Liverpool etc., Co. 12 Fed. Rep. 77; Baird *v.* R. Co., 41 Fed. Rep. 592; Adams Ex. Co. *v.* Nock, 2 Duv. 562; Chouteaux *v.* Leech, 18 Pa. St. 224; Warden *v.* Greer, 6 Watts, 424.

bailor may show, notwithstanding the possession by him of the carrier's receipt, that he never, in fact, accepted the paper as a contract binding between himself and the carrier;[1] he may show, in short, what the real contract was.[2]

§ 153. **Nor Duress.** — It is said in a Kentucky case, that where there exists an extraordinary necessity for the immediate transportation of goods, and the carrier refuses to take them except under a special contract, the exaction of such a contract ought not to be sanctioned, being obtained under duress.[3] In Texas it has been recently held that a contract signed by a shipper, after he had placed his cattle on the cars of a railroad, limiting the liability of the company, and induced by the refusal of the company to carry the cattle unless it was signed, is void.[4] And it is ruled in Arkansas and Tennessee, that where a carrier affords shippers no opportunity to send their freight except under a limited liability, and refuses to receive it except under such a contract, the latter is not binding on them.[5]

1 Mobile etc. R. Co. *v.* Jurey, 111 U. S. 584; Boorman *v.* Am. Ex. Co., 21 Wis. 152; Strohn *v.* R. Co., 21 Wis. 554; King *v.* Woodbridge, 34 Vt. 565.

2 Mobile etc. R. Co. *v.* Jurey, 111 U. S. 584; Missouri etc. R. Co. *v.* Carter, 29 S. W. Rep. 565 (Tex.).

3 Adams Ex. Co. *v.* Nock, 2 Duv. 562.

4 Missouri etc. R. Co. *v.* Carter, 29 S. W. Rep. 565.

5 Little Rock etc. R. Co. *v.* Cravens, 20 S. W. Rep. 803 (Ark.); Louisville etc. R. Co. *v.* Gilbert, 12 S. W. Rep. 1018 (Tenn.); and see McFadden *v.* R. Co., 92 Mo. 343; 4 S. W. Rep. 689. In Newberger *v.* Express Co., 6 Phila. 174, it is said: "There can be no doubt that if a carrier were to attempt to provide either that all goods should be valued at a fixed sum independently of their real value, or demand an increased compensation in the form of insurance disproportioned to the increase of responsibility and risk, the attempt would be one which the law would discountenance and put down. The remedy of the owner would then be found either in summoning the carrier to accept the goods at the real value and subject to a reasonable charge, and mulcting him in damages if he refused, or in delivering them under protest and calling upon the courts for redress in case of loss." Where the terms of the carrier's special acceptance are reasonable, the fact that the shipper agreed to it "under protest" is, it seems, not material. Goggin *v.* R. Co., 12 Kas. 416.

§ 154. **Nor Fraud.** — Contracts of this character, by reason of the unequal situation of the parties, and of the duties of the carrier and his liability under the common law, and of his restricted rights by reason of his public duty to the commerce of the country, stand upon a different footing from contracts between individuals.[1] They belong to that class of contracts which, on account of the relations of the parties, will not be permitted to stand, unless they are shown to have been entered into understandingly, freely, fairly and without compulsion or undue influence.[2] If any attempt at imposition or deception appears, or any device be resorted to, to mislead the shipper or to keep from his notice any of the written or printed indorsements upon the receipt, which are intended to affect his liability, they will not avail the carrier if they have been overlooked.[3]

It would be a fraud on the shipper for the carrier to insert in the receipt any provision which the customer had no reason to believe it would contain,[4] or to print the limiting clauses in type smaller than the rest of the document, and likely to escape his observation,[5] or to use abbreviations of characters which the shipper would not be likely to understand,[6] or ambiguous or conflicting language.[7] So, it has been held a fraud

1 Railroad Co. *v.* Manufg. Co., 16 Wall. 329; Railroad Co. *v.* Lockwood, 17 Wall. 378-384; Kansas etc. R. Co. *v.* Reynolds, 17 Kan. 252; Merchant Trans. Co. *v* Leysor, 89 Ill. 45; Erie Trans. Co. *v.* Dater, 91 Ill. 195; 33 Am. Rep. 51; Mobile etc. R. Co. *v.* Jurey, 111 U. S. 591; Adams Ex. Co. *v.* Nock, 2 Duv. 562.

2 Laws. Cont. § 259 *et seq.*

3 Hutch. Carr § 245.

4 Strohn *v.* R. Co., 21 Wis. 564.

5 Verner *v.* Sweitzer, 32 Pa. St. 208; Grace *v.* Adams, 100 Mass. 505; Hoadley *v.* North. Trans. Co., 115 Mass. 304; Snider *v.* Adams Ex. Co., 63 Mo. 376; Butler *v.* Heane, 2 Camp. 415; Blossom *v.* Dodd, 43 N. Y. 264.

6 In a bill of lading the following, very illegibly written, appeared: "L. & O. ex. 20 R. R. val." This was interpreted by the carrier to mean: "Leaks and outs excepted $20 railroad valuation." This was held not binding on the shipper. Rosenfeld *v.* R. Co., 103 Ind. 121; 53 Am. Rep. 500; 2 N. E. Rep. 344.

7 Gouger *v.* Jolly, Holt 317; Cobden *v.* Boulton, 2 Camp. 108; Munn *v.* Baker, 2 Stark. 255. In Barney *v.* Prentiss, 4 H. & J. 317; 7 Am. Dec. 670, the carrier had published in several newspapers the time when his stages would start and arrive, which publication contained the following clause: "Fare and allowance of baggage as usual. All baggage to be

on him where, at the time of the delivery of the goods the carrier's servant asked the shipper to sign a paper, who expressed his unwillingness to do so, because he could not see to read it, whereupon the clerk said it was of no consequence, that the signature was a mere matter of form, and the shipper, relying upon these assurances, signed it, but it turned out to be a contract limiting the defendant's liability.[1] So, where a shipper of cattle, after they were on the cars, was presented a paper to sign, just as the train was starting, and without opportunity to read it.[2]

The courts make a distinction between conditions *in* the contract—whether it be a bill of lading or other paper—and conditions not appearing on its face, but attached to it or printed or written on its back. It is said in one case, that there is no difference between public notices by advertisement or placard, and notices printed *on the back* of a receipt,[3] and so far as assent to their terms is sought to be inferred from their acceptance, the latter are equally impotent.[4] In *Railroad Company* v. *Manufacturing Company*,[5] decided by the

at the risk of the owner thereof. All baggage over twenty pounds will hereafter positively be charged and be at the risk of the owners thereof." The plaintiff sued for the value of a parcel which the carrier had failed to deliver; it was admitted that before placing it in the carrier's hands he had known of the advertisement. The Court of Appeals, without deciding whether the carrier could or could not evade his responsibility by publication of notice, ordered judgment for the plaintiff, on the ground that if carriers "can by their publications exempt themselves from their liability, then the publications in the language of the exceptions should be plain, explicit and free from all ambiguity. But, as in the case before the court, the defendant, in the advertisement published by him, has used the most doubtful and ambiguous language, he therefore stands in the same predicament as if no publication had been made."

1 Simons *v.* R. Co., 2 C. B. (N. S.) 620. See Blossom *v.* Dodd, 43 N.Y. 264; 3 Am. Rep. 701; Madan *v.* Sherrard, 73 N. Y. 329; 29 Am. Rep. 153, where a receipt containing conditions was delivered to the plaintiff in a dimly lighted car, and Perry *v.* Thompson, 98 Mass. 249, where over part of the limiting clause in the receipt a revenue stamp was so pasted as to render it unintelligible.

2 Missouri etc. R. Co. *v.* Carter, 29 S. W. Rep. 566; Black *v.* R. Co., 111 Ill. 351; 53 Am. Rep. 628.

3 Western Trans. Co. *v.* Newhall, 24 Ill. 466.

4 Newell *v.* Smith, 49 Vt. 285; Ayers *v.* R. Co., 14 Blatchf. 9; The Isabella, 8 Ben. 139; Mich. Cent. R. Co. *v.* Hale, 6 Mich. 243.

5 16 Wall. 318.

Supreme Court of the United States, a receipt given by a railroad company referred to certain rules and regulations of the company, "a part of which notice is given on the back hereof." On the back were printed certain conditions restricting the common law liability of the company. The receipt was taken by the consignor without either assent or dissent. It was held that the notice was not operative to relieve the company.

§ 155. **Nor Waiver.** — The notice or the limiting condition may be waived by the carrier either by words or acts, and in such case he loses its benefit.[1] Thus, though an express receipt provides that "where the value of the property is not specified in the receipt, the company will not be liable for a sum exceeding fifty dollars," the carrier will, notwithstanding, be liable for the full value of the property in case of loss, if it appear that the receiving agent of the company was correctly informed of their value at the time of the receipt of the goods.[2] The condition as to value may be waived by the carrier's knowledge that the article he accepts is beyond the value.[3] Where a package delivered to an express company for transportation was marked C. O. D. $292, as appeared by the receipt given by the company, the receipt also providing that articles so delivered should be valued under $50, unless otherwise stated therein, the company was charged with notice of the value of the package, and with liability for the full amount.[4] So, where the owner of a package told the carrier that it contained papers as valuable

1 Helsby *v.* Mears, 5 B. & C. 504; Winkfield *v.* Packington, 2 C. & P. 599; Pickford *v.* R. Co., 12 M. & W. 766.

2 Southern Ex. Co. *v.* Newby, 36 Ga. 635. Kember *v.* Southern Ex. Co., 22 La. Ann. 158.

3 Beck *v.* Evans, 3 Camp. 267; Boskowitz *v.* Adams Ex. Co., 5 Cent. L. J. 58; Orndorff *v.* Adams Ex. Co., 3 Bush. 194; Southern Ex. Co. *v.* Crook, 44 Ala. 468.

4 Van Winkle *v.* Adams Ex. Co., 3 Robt. 59.

as money, when it in fact contained money, it was held that this was sufficient to put the carrier on his guard as to the care which should be taken of the package.[1]

§ 156. **Nor Antecedent Parol Contract.**—As the contract of carriage is good by word of mouth, or without any writing,[2] any notice to the customer, after it is made, can have no effect.[3] Upon the receipt of goods for transportation by the carrier, his common law responsibility commences and attaches, and this liability can not be altered by the subsequent delivery to the customer of a bill of lading or other writing containing conditions limiting his liability.[4] And, of course, a carrier can not, after a loss has occurred, restrict his liability by signing or delivering a bill of lading.[5] If, however, the oral negotiations are simply preliminary to the written contract, or the verbal agreement, and the subsequent delivery of the bill of lading is one transaction, the latter is the only evidence of the contract.[6] And where, at the time of the delivery of the

1 Dwight *v.* Brewster, 1 Pick. 50.

2 Mobile etc. R. Co. *v.* Jurey, 111 U. S. 584; American Trans. Co. *v.* Moore, 5 Mich. 368; Dunn *v.* Branner, 13 La. Ann. 452; Roberts *v.* Riley, 15 La. Ann. 103; Shelton *v.* Merchants' Dispatch Co., 36 N. Y. (S. C.) 527, *s. c.*, 59 N. Y. 258.

3 Hamilton *v.* R. Co., 96 N.C. 398; Strohn *v.* R. Co., 21 Wis. 554; Merchants' Trans. Co. *v.* Cornforth, 3 Colo. 280; 25 Am. Rep. 757; Hastings *v.* R. Co., 6 N. Y. (Supp.) 836; Blossom *v.* Griffin, 13 N. Y. 569; Detroit etc. R. Co. *v.* Adams, 15 Mich. 488.

4 Shelton *v.* Despatch Co., 36 N. Y. (S. C.) 527; Coffin *v.* R. Co., 64 Barb. 379; Bostwick *v.* R. Co., 45 N. Y. 712; Strohn *v.* R. Co., 21 Wis. 554; Simons *v.* R. Co., 2 C. B. (N. S.) 620; Cleveland etc. R. Co. *v.* Perkins, 17 Mich. 296; Gott *v.* Dinsmore, 111 Mass. 45; Am. Express Co. *v.* Spellman, 90 Ill. 455; Michigan etc. R. Co. *v.* Boyd, 91 Ill. 268; Shiff *v.* R. Co., 16 Hun. 278; 81 N. Y. 278; Swift *v.* Pacific Mail S. S. Co., 106 N. Y. 206; 12 N. E. Rep. 583; Mo. Pac. R. Co. *v.* Beeson, 30 Kas. 298; 2 Pac. Rep. 496; Park *v.* Preston, 108 N. Y. 434; 15 N. E. Rep. 705; Guillaume *v.* General Trans. Co., 100 N. Y. 491; 3 N. E. Rep. 489; German *v.* R. Co., 38 Ia. 127; Shiff *v.* R. Co., 52 How. Pr. 91; Gage *v.* Terrell, 91 Mass. 299; Mehrback *v.* Liverpool etc. Co., 12 Fed. Rep. 77; Lamb *v.* R. Co., 4 Daly, 483; Perry *v.* Thompson, 98 Mass. 249; Rawson *v.* R. Co., 48 N. Y. 212; Hamilton *v.* R. Co., 96 N. C. 398; 3 S. E. Rep. 164. Nor where the bill of lading was not delivered at the time the goods were received, but was sent by mail to the place of their destination: Louisville etc. R. Co. *v.* Meyer, 78 Ala. 597.

5 Wilde *v.* Merchants' Trans. Co., 47 Ia. 247; The Edwin, 1 Sprague, 477; Cleveland etc. R. Co. *v.* Perkins, 17 Mich. 296; Gott *v.* Dinsmore, 111 Mass. 45; Hastings *v.* R. Co., 6 N. Y. (Supp.) 836.

6 Hill *v.* R. Co., 73 N. Y. 351; 29 Am. Rep. 163; *see post*, § 160.

goods a simple receipt, called a shipping receipt, is given to the consignor, which states that a bill of lading will be issued at a place designated therein, and that the goods are to be transported subject to the conditions expressed in the bill of lading, the latter in the absence of fraud, binds the consignor.[1]

§ 157. **Must have a Consideration.** — The rule that a contract requires a consideration, is elementary.[2] So is the rule that a promise to do, or the doing of what a person is under a previous legal obligation to perform, forms no matter for a consideration, and cannot support a promise.[3] Hence, as a common carrier is bound to carry under his insurance liability whenever requested, the mere agreement to carry does not furnish a consideration for a contract in derogation of his responsibility at common law; nor does his agreement to carry for the price which he might charge in case his liability was not limited, or which it was his custom to charge in such case.[4] Therefore, unless the

1 Wilde *v.* Merchants' Trans. Co., 47 Ia. 272.

2 Lawson on Contracts, § 91.

3 *Id.*, § 101.

4 Bissell *v.* R. Co., 25 N. Y. 442; 82 Am. Dec. 369; Nelson *v.* R. Co., 48 N. Y. 498; German *v.* R. Co., 38 Iowa, 127; Farnham *v.* R. Co., 55 Pa. St. 53; McMillan *v.* R. Co., 16 Mich. 79; 93 Am. Dec. 308; Taylor *v.* R. Co., 39 Ark. 148. A curious view of the case is taken in Kirby *v.* Adams Ex. Co., 2 Mo. (App.) 369, where it is said that this is a matter with which courts can no longer deal. But why they are thus powerless is not explained. In a case in Minnesota it is said: "The delivery and acceptance of the animals for carriage was a sufficient mutual consideration to sustain the agreement as to the extent of the defendant's liability." Hutchinson *v.* R. Co., 37 Minn. 524; 35 N. W. Rep. 433. This is correct, if in that State a common carrier is under no obligation to receive live animals. But this case is overruled without being noticed in the later case of Wehmann *v.* R. Co., 59 N. W. Rep. 546 (Minn.), where it is said: "The validity of the clause is to be determined by the principles of the common law, then the question arises, was there a consideration to support it? Such a clause, to be of force, must stand as a contract between the shipper and the carrier, and, as in the case of all contracts, there must be a consideration for it. One exercising the employment of a common carrier of goods is bound to receive and carry such (within the class of goods that he carries) as are tendered to him for the purposes, and, in the absence of special contract, to carry them with the full common-law liability of a common carrier. His receipt of and undertaking to carry them, being a duty imposed on him by law, is not a consideration to support such special contract. There must be some other. That is generally furnished by some concession in rates. And, where the agreement is set forth in the contract for carriage, it would probably be presumed that, in a

shipper is shown to have received some advantage which he could not have had were the insurance liability of the carrier insisted upon,[1] or the carrier has done something he was not already bound to do,[2] the restrictive contract is not binding on the shipper.[3] And the same is true of a notice limiting the liability of the carrier to a fixed sum.[4] It has been recently held that a railroad company that has made no reduction in its freight rates in consideration of a stipulation against liability for loss from fire, that has furnished its agent with no other form of bills of lading except those which contain a fire clause, and has given him no authority to submit to the shipper the alternative of paying a higher rate for a shipment with the ordinary common law responsibility, is liable for goods destroyed by fire, as an insurer, under a bill of lading containing the fire clause, and this, although the company's officers testify that the company had two freight rates—one under the restricted liability, the other

case where parties could make any, there was some such concession as a consideration for relieving the carrier of part of his common-law liability. But in such a case as this, any abatement of rates is forbidden by act of congress, and therefore none can be presumed. The tariff of joint rates in the case makes no mention of any limitation of liability. They are to be taken, therefore, as rates established for carriage with full common carrier's liability; and under the act of congress no abatement could be made to support a contract for a limited liability. The clause is void for want of a consideration to support it." A railroad carrying the United States mail was required by statute to carry with the mail without charge the messenger in charge of it. It furnished him with a pass containing a limitation on its liability. The messenger being injured, it was held that the limitation was *nudum pactum*. A promise, said the Court, to do that which the promisor is already under a legal obligation to perform is insufficient as a consideration to support a contract. Seybolt *v.* R. Co., 95 N. Y. 562; 47 Am. Rep. 75.

1 As where the carrier reduces his rates where his insurance liability is waived. Bissell *v.* R. Co., 25 N. Y. 442; Nelson *v.* R. Co., 48 N.Y. 493; Farnham *v.* R. Co., 55 Pa. St. 53; Dillard *v.* R. Co., 2 Lea. 288; Jennings *v.* R. Co., 5 N. Y. (Supp.) 140; York Co. *v.* R. Co., 3 Wall. 107; McMillan *v.* R. Co., 16 Mich. 79. Or carries the customer free, Bissell *v.* R. Co., *ante*.

2 As where a railroad received the passenger on its freight trains which it was not bound to do. Arnold *v.* R. Co., 83 Ill. 273; 25 Am. Rep. 383.

3 Adams Ex. Co. *v.* Harris, 21 N. E. Rep. 340; Wiggins *v.* Erie R. Co., 5 Hun. 345; Missouri etc. R. Co. *v.* Carter, 29 S. W. Rep. 565 (Tex.); Kas. Pac. R. Co. *v.* Reynolds, 17 Kas. 251.

4 McFadden *v.* R. Co., *ante*.

without—and that if the shipper had so requested, he would have been allowed to ship his goods under a bill of lading without the fire clause in it.[1]

§ 158. **Time and Manner of Making Claim.**—The carrier may, by contract, limit the time within which claim shall be made against him by the owner of the goods, in case they are damaged or lost. Such a condition is considered proper in order to enable the carrier, while the occurrence is recent, to institute proper inquiries and ascertain the facts.[2] In the case of the great railroad and express companies of the country, each of whom handles scores of packages, large and small, every day, it would be next to impossible for them to explain a loss or injury of which they had no notice until a year or more after it occurred.[3] Nor is such a condition a limitation of the right to sue within the time fixed by law, for having made his claim, the owner may delay his suit to any time within the period of the statute of limitations.[4] So, by contract, the liability of the carrier may be limited to cases in which the claim has been presented in a certain prescribed manner.[5]

The requisites to the binding force of such contracts are:

1. The time and manner of presenting the claim must be reasonable, which question is one of law for the court.[6] Conditions have been sustained as reason-

[1] Louisville etc. R. Co. *v.* Gilbert, 12 S. W. Rep. 1018.

[2] Express Co. *v.* Caldwell, 21 Wall. 264. It does not "limit or restrict the common law liability of the carrier" within those words in a statute. Gulf etc. R. Co. *v.* Trawick, 68 Tex. 314; 2 Am. St. Rep. 494; 4 S. W. Rep. 567.

[3] Weir *v.* Express Co., 5 Phila. 355; South. Ex. Co. *v.* Hunnicutt, 54 Miss. 566; 28 Am. Rep. 385; United States Ex. Co. *v.* Harris, 51 Ind. 107.

[4] Hutch Carr. § 259; Express Co. *v.* Caldwell, 21 Wall. 264.

[5] Wheeler Carr. § 124.

[6] Wheeler Carr. 125; Hermann *v.* West. Union Tel. Co., 57 Wis. 562; Place *v.* Union Ex. Co., 2 Hilt. 19; Browning *v.* R. Co., 2 Daly. 117. Whether the owner had a good excuse for not giving the no-

able, that the carrier shall not be held liable for loss of or damage to the property unless notice shall be given within thirty,[1] or forty days,[2] or even a shorter time,[3] after the loss or damage occurred, or the property should have been delivered; that the notice shall be given in writing to some particular officer of the carrier,[4] or that the statement of claim shall be verified by affidavit;[5] or made at the time the goods are received by the consignee, and before they are mingled with other goods.[6] Where the condition is that the claim is to be made in a certain number of days after shipment of the property without reference to the time of the loss, it is unreasonable.[7] A condition re-

tice is a question for the jury. Glenn *v.* South. Ex. Co., 86 Tenn. 594; 8 S. W. Rep. 152; Dawson *v.* R. Co., 76 Mo. 514.

1 Southern Ex. Co. *v.* Glenn, 84 Tenn. 472; Glenn *v.* South. Ex. Co., 86 Tenn. 594; 8 S. W. Rep. 152; Kaiser *v.* Hoey, 1 N. Y. (Supp.) 429; Ghormley *v.* Dinsmore, 51 N. Y. (S. C.) 196; Hirschburg *v.* Dinsmore, 12 Daly. 429; 67 How. Pr. 103; Weir *v.* Express Co., 5 Phila. 355.

2 Gulf etc. R. Co. *v.* Trawick, 68 Tex. 314; 2 Am. St. Rep. 494; 4 S. W. Rep. 567; Thompson *v.* R. Co., 22 Mo. (App.) 321.

3 Dawson *v.* R. Co., 76 Mo. 514; Wabash etc. R. Co., *v.* Black, 11 Ill. (App.) 465; Chicago etc. R. Co. *v.* Simms, 18 Ill. (App.) 68; McBeath *v.* R. Co., 20 Mo. (App.) 445.

4 Mo. Pac. R. Co. *v.* Scott, 2 Tex. (App.) 324; Baltimore etc. R. Co. *v.* Cooper, 6 South. Rep. 327; Dawson *v.* R. Co., 76 Mo. 514; Texas etc. R. Co. *v.* Jackson, 3 Tex. Civ. Cas. 41.

5 Texas etc. R. Co. *v.* Youngblood, 23 A. & E. R. R. Cas. 690; International etc. R. Co. *v.* Underwood, 62 Tex. 21; Black *v.* R. Co., 111 Ill. 351; 53 Am. Rep. 629; Brown *v.* R. Co. 18 Mo. (App.) 568; Wabash etc. R. Co. *v.* Black, 11 Ill. (App.) 465; Chicago etc. R. Co. *v.* Simms, 18 Ill. (App.) 68.

6 The Santee, 2 Ben. 419. Such a provision is usually found in the carriage of live stock. Goggin *v.* R. Co., 12 Kas. 416; Rice *v.* R. Co., 63 Mo. 314; Sprague *v.* R. Co., 34 Kas. 347; Owen *v.* R. Co., 9 S. W. Rep. 698 (Ky.); Mo. Pac. R. Co. *v.* Harris, 67 Tex. 166; ; Texas etc. R. Co. *v.* Scrivener, 2 Tex. (App.) Cas. 328; Texas etc. R. Co. *v.* Hamm, Id. 496; Texas etc. R. Co. *v.* Morris, 16 A. E. R. R. Cas. 259; Galveston etc. R. Co. *v.* Boothe, 3 Tex. Civ. Cas. 364; Brown *v.* Adams, Id. 392, and while sustained in some cases has been declared void in Tennessee, Smither *v.* R. Co., 6 S. W. Rep. 209. As to what is "removing" or "intermingling" see Chicago etc. R. Co. *v.* Abels, 60 Miss. 1017. The phrase "before or at the time the stock is unloaded," is not limited to the identical moment; the notice need only be so immediate that its object may be obtained. Goggin *v.* R. Co., 12 Kas. 416.

7 Pacific Ex. Co. *v.* Darnell, 6 S. W. Rep. 765 (Tex.); South. Ex. Co. *v.* Caperton, 44 Ala. 101; Adams Ex. Co. *v.* Reagan, 29 Ind. 21; Porter *v.* South. Ex. Co., 4 S. C. 135; Central etc. R. Co. *v.* Soper, 59 Fed. Rep. 879. In Express Company *v.* Caldwell, 21 Wall. 264, a limitation of ninety days from the time of its receipt by the company, was considered lawful and binding, and not unreasonable where the time for the transit of the package was only one day.

quiring claim to be made before the property is removed, is not reasonable, as to latent defects or property which cannot well be examined then.[1] And a condition that no action will lie against the carrier unless commenced and citation served within forty days, is void, as contrary to the statute governing procedure in courts of justice,[2] and so is any condition of the kind shortening the time allowed by statute for making a claim.[3]

2. Where notice is required to be given to some particular officer before the property is removed, the carrier, when sued, must show that he had an officer or agent so situated that the notice could be given.[4] In Texas, where the contract required the shipper to give notice in writing of any claim for damages to some general officer of the carrier, or to its nearest station agent, within one day after the delivery of the cattle, and before they were removed, slaughtered, or intermingled with others, it was held that the burden was on the carrier to show that it afforded the shipper reasonable facilities to comply with the contract; and where the cattle were delivered in a large city, in which it was doubtful whether the carrier had an officer known as the "station agent," it should also appear that the shipper knew what was meant by the term "general officers," and that they were so accessible that he could have reached them, by the exercise of reasonable diligence, within the required time.[5]

1 Capehart *v.* R. Co., 81 N. C. 438; 31 Am. Rep. 505; Capehart *v.* R. Co., 77 N. C. 355; Memphis etc. R. Co. *v.* Holloway, 9 Baxt. 188; Ormsby *v.* R. Co., 4 Fed. Rep. 76; Sanford *v.* R. Co., 11 Cush. 155.

2 Gulf, etc., R. Co. *v.* Hume, 27 S. W. Rep. 110 (Tex.)

3 Gulf, etc., R. Co. *v.* Gann, 28 S. W. Rep. 349 (Tex.).

4 Mo. Pac. R. Co. *v.* Harris, 67 Tex. 166; 2 S. W. Rep. 574; Mo. Pac. R. Co. *v.* Fagan, 9 S. W. Rep. 749; Mo. Pac. R. Co. *v.* Cornwall, 70 Tex. 611; 8 S. W. Rep. 312; Good *v.* R. Co., 11 S. W. Rep. 854; Mo. etc. R. Co. *v.* Carter, 29 S. W. Rep. 565.

5 Missouri etc. R. Co. *v.* Childress, 27 S. W. Rep. 560.

3. The terms of the notice must be definite. A clause, for example, that a claim must be presented within a given time *in order to receive attention*, is meaningless and unenforceable.[1] The time runs not from the day of the loss or injury, but from the day when it is ascertained.[2]

The requirements of the notice may be waived by the carrier.[3] Thus, where an unverified written claim was presented when the contract required a verified one, and the carrier received it without objection, and afterwards treated the claim as pending for adjustment upon its merits, it was held that he had waived the benefit of such provision.[4] Though the contract provide that the claim must be made in writing or be verified by affidavit, if it is presented orally or without the affidavit, and no objection is made on that account, the requirement will be treated as waived.[5]

§ 159. **Other Conditions.** — Many other conditions in contracts for carriage of goods have been before the courts, and have been passed upon from the point of view of their reasonableness.[6] Conditions have been sustained that the owner of stock shall take the risk of damage through delay; or of their being injured in consequence of heat, suffocation, or being crowded;[7] that the shipper is to care for the cattle while in

1 Dunn *v.* R. Co., 68 Mo. 268; Sanford *v.* R. Co., 11 Cush. 155.

2 Ghormley *v.* Dinsmore, 51 N. Y. (S. C.) 196; Sanford *v.* R. Co., 11 Cush. 155; Glenn *v.* South. Ex. Co., 86 Tenn. 594; 8 S. W. Rep. 152; Memphis etc. R. Co. *v.* Holloway, 9 Baxt. 188.

3 Owen *v.* R. Co., 9 S. W. Rep. 841; Rice *v.* R. Co., 63 Mo. 314; Chicago etc. R. Co. *v.* Katzenbach, 118 Ind. 174; 20 N. E. Rep. 709; Hudson *v.* R. Co., 60 N. W. Rep. 608 (Ia.).

4 Wabash R. Co. *v.* Brown, 39 N. E. Rep. 273 (Ill.).

5 Bennett *v.* R. Co., 12 Oreg. 47; 6 Pac. Rep. 160; Rice *v.* R. Co., 63 Mo. 314; Texas etc. R. Co. *v.* Youngblood, *supra;* International etc. R. Co. *v.* Underwood, *supra.*

6 Dwyer *v.* R. Co., 7 S. W. Rep. 504.

7 Squire *v.* R. Co., 98 Mass. 239.

transit, and attend to loading and unloading them, and assume all risks incident thereto.[1] But conditions are unreasonable that before a consignee can obtain his wheat from the company's bins he shall receipt for the quantity;[2] that a passenger on a steam boat shall not take into his state-room such baggage as he may require for his personal use;[3] that the carrier shall be liable only as a warehouseman after the arrival of the freight at its destination, the consignee to receive and take it away as soon as it is ready—no notice of its arrival being provided for;[4] that the shipper will accept the cars furnished him for his stock;[5] that the shipper would furnish to each conductor in whose charge the cattle might be placed, a statement of their condition, and that a failure to furnish such report to the conductors should be conclusive evidence that the cattle were in good condition.[6]

§ 160. **Bills of Lading as Receipts and Contracts.** —Originally, a bill of lading is the acknowledgment given by the master of a vessel stating the receipt of the goods, setting out the engagement to carry and deliver, and executed in triplicate, one copy being sent to the consignee, one retained by the consignor and one by the master.[7] In the present day, similar documents are issued by carriers by land as well as by water.[8] It is at once a receipt and a contract. So far as it is a

1 Myers *v.* R. Co., 90 Mo. 98; 2 S. W. Rep. 263. See Hart *v.* R. Co., 69 Ia. 485; 29 N. W. Rep. 597.

2 Christian *v.* R. Co., 20 Minn. 21.

3 Macklin *v.* New Jersey Steam. Co., 7 Abb. Pr. (N. S.) 229.

4 Louisville etc. R. Co. *v.* Oden, 80 Ala. 38.

5 Gulf etc. R. Co. *v.* Wilhelm, 3 Tex. Civ. Cas. 460.

6 Mo. etc. R. Co. *v.* Carter, 29 S. W. Rep. 565.

7 Wooster *v.* Tarr, 8 Allen 270; 85 Am. Dec. 707. In case of a variance the one given to the shipper controls. Ontario Bk. *v.* Hanlan, 23 Hun. 283. As between the marks on the goods and the destination in the bill of lading the latter controls. Moore *v.* Henry, 18 Mo. (App.) 35; Wheeler *v.* R. Co., 3 Mo. (App.) 358.

8 A carrier's receipt and a bill of lading are substantially the same thing. Dodge *v.* Meyer, 61 Cal. 405.

receipt, the bill of lading may be varied or controlled by parol evidence.[1] The quantity of goods received, the contents of boxes or bales or the like, and their value or condition, may be shown by parol to be different from the statements regarding them made in the receipt.[2] So the consideration clause may be contradicted, and the shipper may deny that the goods were sent under a reduced tariff of charges.[3]

So far as the agreement to carry and deliver is concerned, it is a contract. Like all other contracts, we have seen that it is immaterial whether it was read at the time of signing or accepting or not, or whether anything was said about the exceptions contained in it; that a party entering into a contract is presumed to do so with his eyes open, and in the absence of fraud or mistake, cannot be allowed to lead the other to believe that he agrees to that which it is his intention afterwards to repudiate.[4] Like all other contracts, the writing becomes the sole evidence of the final understanding, and all antecedent agreements or undertakings are merged therein and extinguished thereby.[5]

1 Hutch. Carr. 122; Wayland *v.* Moseby, 5 Ala. 430; 39 Am. Dec. 335; Cox. *v.* Peterson, 30 Ala. 608; 78 Am. Dec. 145; Meyer *v.* Peck, 28 N. Y. 590.

2 The Black Warrior, 1 McAll. 181; The Oriflamme, 1 Sawy. 176; Carson *v.* Harris, 4 G. Greene. 516; Gowdy *v.* Lyon, 9 B. Mon. 112; Barrett *v.* Rogers, 7 Mass. 297; Richards *v.* Doe, 100 Mass. 524; Seller *v.* The Pacific, 1 Oregon 409; The Martha *v.* Olcott, 140; The Adriatic, 9 Cent. L. J. 201; The Nith, 36 Fed. Rep. 86; Brouty *v.* 500 Staves, 21 Fed. Rep. 590; Burwell *v.* R. Co., 94 N. C. 451; O'Brien *v.* Gilchrist, 34 Me. 554; 56 Am. Dec. 677; Wetzler *v.* Collins, 70 Me. 290; 35 Am. Rep. 327; Strong *v.* R. Co., 15 Mich. 206; 93 Am. Dec. 185; Blade *v.* R. Co., 10 Wis. 14; Bissell *v.* Price, 16 Ill. 408; Arend *v.* Liverpool S. S. Co., 6 Lans. 457; 64 Barb. 118; Kember *v.* South. Ex. Co., 22 La. Ann. 158; 2 Am. Rep. 719; South. Ex. Co. *v.* Newby, 36 Ga. 635; 91 Am. Dec. 738.

3 McFadden *v.* R. Co., 92 Mo. 343; 1 Am. St. Rep. 721; 4 S. W. Rep. 689; see Louisville etc. R. Co. *v.* Wilson, 21 N. E. Rep. 341.

4 See *ante*, § 147.

5 Southern Ex. Co. *v.* Dickson, 94 U. S. 549; Collender *v.* Dinsmore, 55 N. Y. 200; 14 Am. Rep. 224; Long *v.* R. Co., 50 N. Y. 76; Belger *v.* Dinsmore, 51 N. Y. 166; 10 Am. Rep. 575; Hinckley *v.* R. Co., 56 N. Y. 429; St. Louis etc. R. Co. *v.* Cleary, 77 Mo. 634; 46 Am. Rep. 13; Germania Fire Ins. Co. *v.* R. Co., 72 N. Y. 90; 28 Am. Rep. 113; Hostetter *v.* R. Co., 11 Atl. Rep. 609 (Pa.); Louisville etc. R. Co. *v.* Wilson, 21 N. E. Rep. 341; O'Rourke *v.* 220 Tons of Coal, 1 Fed. Rep. 619; The Caledonia, 43 Fed. Rep. 631.

And like all other contracts, it is to be construed according to the legal import of its terms, and cannot be varied, explained or contradicted by oral evidence.[1]

The shipper may prove a collateral agreement, such as that the carrier agreed to carry the goods to a point beyond that named in the bill of lading.[2] In a well-known case, A had arranged orally with a railroad to carry goods for him to E, on its line, and thence by a connecting line to K; and at the same time signed, without noticing its contents, a consignment note by which the goods were directed to be taken to E. Parol evidence was admitted to show an agreement to carry on to K.[3] And fraud, mistake or duress in the making of the contract, may, of course, be shown.[4]

§ 161. **Effect of the Special Contract.** — The making of a special contract limiting the carrier's responsibility, does not change the character of his employment—he remains a common carrier under a

1 Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174; York Company *v.* R. Co., 3 Wall. 107; Grace *v.* Adams, 100 Mass. 505; 97 Am. Dec. 117; Wells *v.* Steam Nav. Co., 8 N. Y. 375; Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485; 62 Am. Dec. 125; Kirkland *v.* Dinsmore, 62 N. Y. 171; 20 Am. Rep. 475; White *v.* Van Kirk, 25 Barb. 16; Wolfe *v.* Myers, 3 Sand. 7; Cox *v.* Peterson, 30 Ala. 608; 68 Am. Dec. 145; Wayland *v.* Moseby, 5 Ala. 430; 39 Am. Dec. 335; Roberts *v.* Riley, 15 La. Ann. 103; 77 Am. Dec. 183; Indianapolis etc. R. Co. *v.* Remmy, 13 Ind. 518; Oppenheimer *v.* United States Ex. Co., 69 Ill. 62; 18 Am. Rep. 596; Pemberton Co. *v.* R. Co., 104 Mass. 144; Hopkins *v.* R. Co., 29 Kas. 544; Wichita Bk. *v.* R. Co., 20 Kas. 519; White *v.* Ashton, 51 N. Y. 280; Garden Grove Bk. *v.* R. Co., 97 Ia. 526; 25 N. W. Rep. 761; Wetzler *v.* Collins, 70 Me. 290; 35 Am. Rep. 327; Petrie *v.* Heller, 35 Fed. Rep. 310; Snow *v.* R. Co., 109 Ind. 422; 9 N. E. Rep. 702. In Collender *v.* Dinsmore, *supra*, it was said: "There are cases holding in effect that the prior negotiations and conversation of the parties can be given in evidence, when there is an ambiguity, to show in what sense particular words or phrases were used by the parties in making the contract," citing Selden *v.* Williams, 9 Watts 9 (1839); Gray *v.* Harper, 1 Story 574 (1841); Kemble *v.* Lull, 3 McLean 272 (1843). But Kemble *v.* Lull decides nothing of the kind. The court only remarked that there was no ambiguity in the contract, and that parol evidence was not admissible to explain or vary it.

2 Balt. etc. R. Co. *v.* Brown, 54 Pa. St. 77; Savannah etc. R. Co. *v.* Collins, 77 Ga. 376; Pereira *v.* R. Co., 66 Cal. 92; 4 Pac. Rep. 988; Riley *v.* R. Co., 34 Hun. 97; *contra*, Hewett *v.* R. Co., 63 Ia. 611.

3 Malpas *v.* R. Co., L. R. 1 C. P. 336, explained in Lawson Contr. § 378.

4 *Ante* § 152. See Lawson Contr. Cap. VI.

limited responsibility, and does not become an ordinary bailee for hire.[1] Mr. Justice Story,[2] citing an early English case,[3] has raised the question without answering it, whether if a carrier's contract contain certain exceptions to his liability, but omit those which the common law allows for his benefit—the act of God and the public enemy—the express exceptions do not exclude the implied ones, in accordance with the maxim *expressio unius est exclusio alterius.*[4] Modern bills of lading in the carriage of goods by water have in England always contained all the common law exceptions, and the point has not, therefore, arisen during this century in that country.[5] In an early case in

1 Railroad Co. *v.* Lockwood, 17 Wall. 357; Mich. Cent. R. Co. *v.* Hale, 6 Mich. 243; Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Id. 362; Swindler *v.* Hilliard, 2 Rich. 216; Parker *v.* Brinson, 9 Id. 201; Steele *v.* Townsend, 37 Ala. 247. The contrary has been incorrectly assumed by some judges. See Penn. *v.* R. Co., 49 N.Y. 204; Lake Shore etc. R. Co. *v.* Perkins, 25 Mich. 329.

2 Story Bail. § 550.

3 The case referred to is Bever *v.* Tomlinson (1796), thus stated in Abbott on Shipping (6th Am. ed.) p. 4. cap. 6, p. 386: "In a case which came before the Court of King's Bench a short time before the late alteration of the bill of lading and which was an action brought to recover the value of goods for which the master had signed a bill of lading containing an exception only of the perils of the sea, although made during the time of a war, and which goods were lost in consequence of the ship being designedly struck by the vessel of an enemy; it was doubted by the court whether a loss so occasioned were within the meaning of this exception, and the cause never proceeded to a final judgment. The express exception in this case afforded room to contend that the exception of the act of the King's enemies, which arises out of general rules of law, was meant to be excluded in the particular instance."

4 The express mention of one thing implies the exclusion of another. See Broom Leg. Max. 626.

5 In Scaife *v.* Farrant, 23 W. R. 469, 840; 2 Cent. L. J. 383, 605 (1875); the defendant was a wagoner who received furniture for removal under a contract by which he took the risk of breakage not exceeding $5 on any one article. The furniture was accidentally burned *en route*, and it was held that he was not responsible. Bramwell, B., saying: "The case does not stand on the common law of carrier and customer. This man says: 'I will take goods not in a fit condition to travel and will put them in a condition to travel,' which is not the ordinary case of carrier and customer. Then he says in his letter that his terms are '£22 10s., with risk of breakage in transit.' This means 'I will take on me risk of breakage in transit.' If he were a common carrier he would undertake not only this risk but all risks. But he says 'I undertake for one particular risk.' Why do not the general rules apply—'*expressio unius est exclusio alterius*,' and *expressum facit cessare tacitum*?" That is to say, the defendant stipulates not to be liable for anything else. No doubt he would be liable for failure in the use of ordinary skill, because ordinary care is not excluded."

South Carolina, it was said that if a common carrier specially undertake to deliver safely any article carried, he will be bound by his undertaking to answer for the loss, although it may happen from a cause which in the absence of an express contract would excuse him;[1] and in Georgia, where a wagoner contracted to deliver certain packages in good order and condition, "unavoidable accidents only excepted," it was held that this exception excluded all others, and that therefore he would be liable for a loss by the public enemy.[2] But in Massachusetts it has been ruled that a shipowner did not enlarge his common law liability by signing a bill of lading in which he stipulated that the goods should be delivered, the "dangers of the seas only excepted," so as to be liable for a loss arising from the act of a public enemy.[3]

§ 162. **Contracts Strictly Construed Against the Carrier.** —While it is competent for common carriers to provide by contract for exemption from their common law liability, it must be done in clear and unambiguous language, and the rule that the language of contracts, if ambiguous is to be construed against the party using it, is rigidly applied to such contracts.[4]

1 Gaither *v.* Barnet, 2 Brev. 488. The reporter speaks of the loss in this case as an "unavoidable accident," but it is clear from the opinion that this phrase is used by him as synonymous with the "act of God."

2 Fish *v.* Chapman, 2 Ga. 349.

3 Gage *v.* Tirrell, 9 Allen 299. See U. S. *v.* Power, 6 Mont. 271.

4 Edsall *v.* Camden etc. R. Co., 50 N. Y. 661; Magnin *v.* Dinsmore, 56 N. Y. 168; Steele *v.* Townsend, 37 Ala. 247; 79 Am. Dec. 49; Ayres *v.* R. Co., 14 Blatchf. 1; Union Mut. Ins. Co. *v.* R. Co., 1 Disney 159; St. L. etc. R. Co. *v.* Smuck, 49 Ind. 302; Barter *v.* Wheeler, 49 N. H. 9; 6 Am. Rep. 434; Southern Ex. Co. *v.* Moon, 39 Miss. 832; Hooper *v.* Wells, 27 Cal. 11; 85 Am. Dec. 211; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Indiana etc. R. Co. *v.* Munday, 21 Ind. 48; 83 Am. Dec. 339; Levering *v.* Union Trans. Co., 42 Mo. 88; 97 Am. Dec. 320; Rosenfeld *v.* R. Co., 103 Ind. 121; 53 Am. Rep. 501; 2 N. E. Rep. 344; Overland Mail Co. *v.* Carroll, 7 Colo. 43; 1 Pac. Rep. 682; Gronstadt *v.* Witthoff, 15 Fed. Rep. 266; Marx *v.* Nat. S. S. Co. 22 Fed. Rep. 680; Little Rock etc. R. Co. *v.* Talbot, 39 Ark. 523. The rule that contracts are to be construed according to the law of the place where they are made (Lawson Cont. § 347), applies to the contracts of common carriers. Cantu *v.* Ben-

An exemption from a loss or damage through any particular cause will never be construed to cover a negligent loss of that character.[1] An ex-

nett, 39 Tex. 303; Penninsular etc. Co. *v.* Shand, 11 Jur. (U. S.) 771; Penn. Co. *v.* Fairchild, 99 Ill. 260; Hale *v.* New Jersey etc. Co., 15 Conn. 537; First Nat. Bk. *v.* Shaw, 61 N. Y. 283; Hoadley *v.* North. Trans. Co., 115 Mass. 355; Robinson *v.* Merchts. Trans. Co., 45 Ia. 470.

[1] Ashmore *v.* Penn. Steam etc. Co.. 28 N. J. (L.) 180; Memphis etc. R. Co. *v.* Jones, 2 Head. 517; Indiana etc. R. Co. *v.* Munday, 21 Ind. 48; New Jersey Steam etc. Co. *v.* Merchants' Bk., 6 How. 344. Even in New York where the power to contract against negligence is conceded the intent to exclude negligence of the carrier's servants must appear in the contract in plain terms, for if negligence is not expressly excluded the presumption will be that it was not intended by the parties to be. Magnin *v.* Dinsmore, 56 N. Y. 168; Condict *v.* R. Co., 54 N. Y. 500; Lamb *v.* R. Co., 46 N. Y. 271; 7 Am. Rep. 327; 2 Daly 454; Knell *v.* U. S. Steamship Co., 23 N. Y. 423; French *v.* R. Co., 4 Keyes, 108; 2 Abb. App. Dec. 196; Smith *v.* R. Co., 29 Barb. 132; 24 N. Y. 222; Stoddard *v.* R. Co., 5 Sandf. 180; Edsall *v.* R. Co., 50 N. Y. 661; Guillaume *v.* Hamburg etc. Packet Co., 42 N. Y. 212; Gleadell *v.* Thomson, 56 N. Y. 194; Stedman *v.* Western Trans. Co., 48 Barb. 97; Alexander *v.* Greene, 7 Hill 533; Camden etc. R. Co. *v.* Burke, 13 Wend. 611; Moore *v.* Evans, 14 Barb. 524; Westcott *v.* Fargo, 63 Barb. 349; Wells *v.* Steam. Nav. Co., 8 N. Y. 375; Wooden *v.* Austin, 51 Barb. 9. Thus an exception simply of a loss by fire will not cover a negligent fire. Condict *v.* R. Co., *supra;* Lamb *v.* R. Co., *supra;* Holsapple *v.* R. Co., 86 N. Y. 275; Steinweg *v.* R. Co., 43 N. Y. 123; nor will a release of loss or injuries "from whatsoever cause arising," Mynard *v.* R. Co., 71 N. Y. 180; 27 Am. Rep. 28; Smith *v.* R. Co., 27 Barb. 132; 24 N. Y. 222. Though goods are sent at "owner's risk," the carrier is still liable for a negligent loss or injury. Camden etc. R. Co. *v.* Burke, 13 Wend. 611; Moore *v.* Evans, 14 Barb. 524; Alexander *v.* Greene, 7 Hill 533; Wells *v.* Steam Nav. Co., 8 N. Y. 375; Westcott *v.* Fargo, 63 Barb. 349; Wooden *v.* Austin, 51 Barb. 9. In the light of those authorities the ruling in the New York case of Cragin *v.* R. Co., 51 N. Y. 61; 10 Am. Rep. 559 (1872), is peculiar. Here the railroad undertook to carry a car load of hogs from Buffalo to Albany, under an agreement whereby the shipper assumed the risks of injuries from "heat, suffocation, &c." The hogs died from the effects of heat, the result of the negligence of the defendant's servants in not watering them and cooling them by wetting. The Commission of Appeals held that the defendants, as common carriers of cattle, were not insurers of them against the consequences of their own vitality. In the absence of any restrictive contract, if the defendants provided proper cars and exercised reasonable care, they were not responsible for such of the animals as might perish from heat. Therefore the limitation was unnecessary. "If it be held," said Earl., C., "that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault on its part, then it gets nothing; for in such case, without the stipulation it would not be responsible. Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence in consequence of which the hogs died from heat." Subsequently the New York court has fought shy of this ruling contenting itself with "distinguishing" it without actually overruling it. In Mynard's case, *supra* (1877), Church, C. J., who delivered the opinion, did not think "under the peculiar stipulation and the character of the property in that case that it is in conflict with the views above expressd viz.: that an exemption from liability 'from whatsoever cause arising' did not include a loss arising through

emption from liability for damage to oranges from the "effect of climate" will not protect the carrier who lands them on a wharf on a day so cold that they freeze there.[1] An exemption from liability for "any damage" must be read as if followed by the clause "not caused by negligence."[2] An exemption from liability for "decay" of meat, covers only its inherent tendency to decay, and not decay caused by negligence of the carrier.[3] An exemption from responsibility for "delay," does not cover a negligent delay.[4] An exemption from liability for "detention," will not cover damage to the goods caused by the carrier's servants neglecting to mark the charges as paid, whereby they were detained on their arrival, under a groundless claim of charges.[5] The word "errors," in a contract means mistakes, and not waste or negligence.[6] Though the carrier is made not responsible for damages occasioned by "escapes from any cause whatever," he is still liable for an "escape" occasioned by his negligence, or where such neg-

neglect. In Holsapple *v.* R. Co., *supra* (1881) the case was distinguished in the same way. But in Nicholas *v.* R. Co., 89 N. Y. 370 (1882) where the property was fruit trees shipped under a release of liability for damage, occasioned by delays from any cause, or change of weather, or loss or injury by fire or water, heat or cold,' the release had been construed by the Supreme Court to relieve the defendant from liability for a loss by freezing occasioned by the negligence of the defendant's servants. The Cragin case was indorsed, and its reasoning followed. Cold, said the Court against which the carrier could not guard, was the "act of God," for which, at common law, he was not responsible, and "to give any force to the terms in the release" the risk of the carrier's negligently exposing the goods to the cold must be incorporated in the release. Nicholas *v.* R. Co., 6 Thomp. & C. 606; 4 Hun. 327. But the Court of Appeals reversed the judgment of the Supreme Court and held the carrier liable. This time though practically overruling it the Court did not refer to the Cragin case. The Cragin case is clearly wrong; for a loss occasioned by the act of God or the public enemy a carrier is still liable if it be brought about by his own negligence. But if it is correct, the simple fact that the bill of lading or other contract sets out these exemptions, is sufficient to excuse the carrier for a negligent loss of this description. There is no authority for such a conclusion in any English or American adjudication.

1 The Aline, 23 Blatchf. 335, 25 Fed. Rep. 562.

2 The Hadji, 20 Fed. Rep. 875; Czech *v.* Gen. Steam Nav. Co., L. R. 3 C. P. 14.

3 Sherman *v.* Inman S. S. Co., 26 Hun. 107.

4 Berje *v.* R. Co., 37 La. Ann. 468; McKay *v.* R. Co., 3 N. Y. (Supp.) 708.

5 Gordon *v.* R. Co., L. R. 82, B. Div. 44.

6 Sanford *v.* R. Co., 11 Cush. 155.

ligence was an active and co-operating cause in producing it.[1] Though the shipper of stock agrees to "feed, water and take proper care of them," the carrier is still liable if he neglects to furnish adequate vehicles to afford the owner reasonable opportunities to care for them, and subjects them to unnecessary delay in transportation,[2] or negligently carries them beyond their destination.[3] The exception of "fire" will never cover a negligent fire.[4] An exemption from liability for freezing will still leave the carrier liable for freezing resulting from failure to forward with reasonable dispatch.[5] The phrase "inherent deterioration," will not excuse the delivery of fruit in a decayed condition, which it is shown was so stowed by the carrier as not to permit proper ventilation, and therefore rotted.[6] The condition "not to be accountable for leakage or breakage," protects against unavoidable losses of this kind, leaving the carrier still responsible for want of skill or care in the handling, stowage or delivery of the goods.[7] An exception of any "loss" will not

1 Oxley *v.* R. Co., 65 Mo. 629.

2 South. etc. R. Co. *v.* Henlein, 52 Ala. 606; Wabash etc. R. Co. *v.* Pratt, 15 Ill. (App.) 177; Dunn *v.* R. Co., 68 Mo. 269.

3 Bryant *v.* R. Co., 68 Ga. 805.

4 New Orleans Ins. Co. *v.* R. Co., 20 La. Ann. 302; Levy *v.* R. Co., 23 La. Ann. 477; York Co. *v.* R. Co., 3 Wall. 107; Bank of Kentucky *v.* Adams Express Co. 93 U. S. 174; Erie R. Co. *v.* Lockwood 28 Ohio St. 358; Michigan etc. R. Co. *v.* Heaton, 37 Ind. 448; 10 Am. Rep. 89; Stedman *v.* West Trans. Co., 48 Barb. 97; Lamb *v.* R. Co., 46 N. Y. 271; 7 Am. Rep. 327; Condict *v.* R. Co., 54 N. Y. 500; Pemberton Co. *v.* R. Co., 104 Mass. 144; Montgomery R. Co. *v.* Edmonds, 41 Ala. 667; Empire Trans. Co. *v.* Oil Co., 63 Pa. St. 14; 3 Am. Rep. 515; Powell *v.* R. Co., 32 Pa. St. 14; 75 Am. Dec. 564; Steinweg *v.* R. Co., 43 N. Y. 123; 3 Am. Rep. 673; Colton *v.* R. Co., 67 Pa. St. 211; 5 Am. Rep. 424; Scruggs *v.* R. Co., 5 McCreary, 590; Grey *v.* Mobile Trade Co., 55 Ala. 387; 28 Am. Rep. 729; New Orleans etc. R. Co. *v.* Faler, 58 Miss. 911; Louisville etc. R. Co. *v.* Odon, 80 Ala., 38; Insurance Co. *v.* St. Louis etc. R. Co., 9 Fed. Rep. 811; Rand *v.* Merchants Despatch Co., 59 N. H. 363; Little Rock etc. R. Co. *v.* Talbot, 39 Ark. 523; 47 Id. 97; Little Rock etc. R. Co. *v.* Harper, 44 Ark. 208; Montgomery R. Co. *v.* Edmonds, 41 Ala. 667; The City of Norwich, 3 Ben. 375; Chicago etc. R. Co. *v.* Moss, 60 Miss. 1003.

5 Reed *v.* R. Co., 60 Mo. 199; Wolf *v.* R. Co., 43 Mo. 421; see The Alesia, 35 Fed. Rep. 531

6 The America, 8 Ben. 491.

7 Philips *v.* Clark, 2 C. B. (N. S.) 156, 3 Jur. (N. S.) 467, 26 L. J. C. P. 168 (1857); Steele *v.* Townsend, 37 Ala. 247; The Pererie, 8 Ben. 301; Six Hundred and Thirty Casks, 14 Blatchf. 517; The David and Caroline, 5 Blatchf. 266; The Delhi, 4 Ben. 345; Reno *v.* Hogan, 12 B. Mon. 63 (1851); The Invincible, 1 Low. 255; Dede-

cover a negligent loss.[1] The term "owner's risk," imports that the owner assumes the risks arising from the ordinary dangers of transportation, which the reasonable and ordinary care of the common carrier might be insufficient to prevent, and the latter is liable only for those dangers which, with ordinary care and prudence, might be avoided,[2] but is still answerable for his own negligence or misconduct, or that of his servants or agents.[3] An exception of liability for "rust," will excuse rust caused by the sweat or moisture of the place where the goods are stowed, but not rust arising from the entrance of water through an insufficient ceiling in the ship.[4] But the burden of proving that the water reached the goods through the negligence of the carrier, is upon the shipper.[5] An exemption of liability for "stranding," will not apply, if the vessel was stranded by reason of the master's negligence in mistaking his course and position, failing to heed fog lights, and a signal gun, and failing to take soundings when it clearly was his duty to do so.[6] An exemption

kam *v.* Vose, 3 Blatchf. 44; Hunnewell *v.* Taber, 2 Sprague, 1; The Oriflamme, 1 Sawy. 176; The Olbers, 3 Ben. 148; Vaughan *v.* Six hundred and Thirty Casks, 7 Ben. 506; Koenigshein *v.* Hamburg etc. Packet Co., 17 Week. Dig. 405; Carey *v.* Atkins, 6 Ben. 562; Nelson *v.* National Steamship Co., 6 Ben. 340; The Colon, 9 Ben. 354. Where a railroad transporting a mirror over its road at the "owner's risk as regards breakage," placed it along with agricultural implements and other heavy freight in a narrow passage way, through which drays and other vehicles were constantly passing, and it was there struck by a passing dray and broken, the company was held liable. Missouri etc. R. Co. *v.* Caldwell, 8 Kas. 244.

1 Jennings *v.* R. Co., 5 N. Y. (Supp.) 140; The Egypt, 25 Fed. Rep. 320.

2 French *v.* R. Co., 4 Keyes 108; 2 Abb. App. 196; Baltimore etc. R. Co. *v.* Rathbone, 1 W. Va. 87; 88 Am. Dec. 664; Morrison *v.* Phillips Co., 44 Wis. 405; 28 Am. Rep. 599.

3 Schieffelin *v.* Harvey, 6 Johns. 170 170; 5 Am. Dec. 206; Anth. 57; Alexander *v.* Greene, 7 Hill 533; Moore *v.* Evans, 14 Barb. 524; Wells *v.* Steam Navigation Co., 8 N. Y. 375; Wallace *v.* Sanders, 42 Ga. 486; Nashville etc. R. Co. *v.* Jackson, 6 Heisk. 271; D'Arc *v.* R. Co., L. R. 9 Com. P. 325; Kiff *v.* R. Co., 32 Kan. 263; Martin *v.* R. Co., L. R. 3 Ex. 9; Cohen *v.* R. Co., L. R. 2 Ex. Div. 253, overruling Stewart *v.* R. Co., 3 H. & C. 135; Canfield *v.* R. Co., 93 N. Y. 532; 45 Am. Rep. 268; The Surrey, 26 Fed. Rep. 791; Bonanno *v.* The Boshenna Bay, 36 Fed. Rep. 697.

4 Richards *v.* Hansen, 1 Fed. Rep. 54 (1880).

5 The Bristol, 6 Fed. Rep. 638; Wolf *v.* The Vanderland, 18 Fed. Rep. 733. See The Nith, 36 Fed. Rep. 86.

6 The Montana, 17 Fed. Rep. 377.

from liability for "suffocation" of animals, will not apply where they are suffocated through the ship overturning on account of lack of proper ballast,[1] or on account of a negligent delay;[2] from "sweating" will not apply to a sweating arising from improper stowage.[3] An exemption from liability for a loss arising from the "viciousness" of cattle, will not excuse a defective car.[4] A condition that animals are to be "watered and fed by the owner and at his risk," while on the cars, refers only to the ordinary sustenance the animals may require in the course of transportation; the throwing of water upon the cattle for the purpose of cooling them, and which in hot weather is often absolutely essential to save them from dying of the excessive heat, is not within this exception; this duty still, for reasons of public convenience devolving upon the carrier.[5] An exemption from "injury to any article of freight during the course of transportation, occasioned by the weather," will not include negligence, as where a railroad, in transporting fruit in cold weather used a common box car when it should have used a refrigerator car.[6] A contract to assume the risk of injury "from whatever cause," will not include an injury caused by negligence.[7] A requirement that notice must be given within "five days after stock are removed from the cars," does not apply where the suit is for not delivering the property at all.[8] A condition as to notice of "any loss or damage," does not apply in a suit

1 Leuw *v.* Dudgeon, L. R. 3 C. P. 17.

2 Sturgeon *v.* St. Louis etc. R. Co., 65 Mo. 569; Ball *v.* Wabash R. Co., 83 Mo. 574.

3 Paturzo *v.* Compagnee Francaise, 31 Fed. Rep. 611; The Portuense, 35 Fed. Rep. 670.

4 Rhodes *v.* R. Co., 9 Bush. 688.

5 Ill. Cent R. Co. *v.* Adams, 42 Ill. 474.

6 Merchants' Despatch Co. *v.* Cornforth, 3 Colo. 280.

7 Wabash etc. R. Co. *v.* Jaggerman, 115 Ill. 407; Mynard *v.* R. Co., 71 N. Y. 180; 27 Am. Rep. 28; Smith *v.* R. Co., 29 Barb. 132; 24 N. Y. 222.

8 Wilson *v.* Wabash etc. R. Co., 23 Mo. (App.) 50.

against the carrier for the *non-delivery* of the goods,[1] as that is neither a "loss" or a "damage"; and a stipulation as to the time of making claim for damage done in transit or before delivered, does not apply where the owner refuses to receive the goods.[2]

Conditions and Exceptions Peculiar to Carriage by Water.

There are certain conditions and exceptions which are found generally in contracts for the carriage of goods by water, as for example:

§ 163. **"Call at Ports."** — Liberty to "call at any port or ports," refers to ports along the course of the voyage specified,[3] and allows the ship to call at such a port, though known to be quarantined.[4]

§ 164. **"Damage."** — Where a bill of lading contained a clause: "The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance," it was held that "damage" would include damage to the goods amounting to total loss or destruction, but not to a loss caused by abstraction of them.[5] It refers to insurance obtainable of the ordinary insurance companies, and not to insurance which might possibly be obtained of special or peculiar insurers.[6] And such a clause is not equivalent to a contract that the carrier shall have the benefit of any insurance on the goods, and does not interfere with the insurer's right to subrogation.[7] Where a bill of lading

[1] Porter *v.* Express Co., 4 S. C. 135; Wilson *v.* R. Co., 23 Mo. (App.) 50.

[2] Gulf etc. R. Co. *v.* Golding, 18 A. & E. R. R. Cas. 732.

[3] Ardan S. S. Co. *v.* Theband, 35 Fed. Rep. 620.

[4] The Sidonian, 34 Fed. Rep. 805; 35 Id. 534.

[5] Taylor *v.* Steam Co., L. R. 92 B. 546.

[6] The Titania, 19 Fed. Rep. 101.

[7] The Hadji, 16 Fed. Rep. 861.

recited the receipt of goods in good order, and added, "not accountable for weights, contents, packing, marks, and damage," it was held that the word "damage" had reference to damage of the goods at the time of their receipt, and not to injuries arising subsequently on the voyage.[1]

§ 165. **"Dangers of the Roads."**—In bills of lading containing an exemption from "the dangers of the seas, roads and rivers," the word "roads" is construed to mean marine roads. It might, however, be held to include roads on land, but if so it would be restricted to those dangers which are immediately caused by roads, such as the overturning of carriages in rough and precipitous places.[2]

§ 166. **Dangers of the Seas and Perils of Navigation.** — The exception which shipowners were accustomed in early days to insert in their contracts, was neither lengthy nor obscure, consisting simply of the words "the dangers of the seas,"[3] in this respect differing greatly from the modern bill of lading.[4] But in consequence of a ruling made by the Court of King's Bench in 1795,[5] and which gave great alarm to carriers by water, a more sweeping clause came into use. This clause which, according to the text books, still pre-

1 The Tommy, 16 Fed. Rep. 601.

2 De Rothschild *v.* Royal Mail Packet Co., 7 Ex. 734; 21 L. J. Ex. 273.

3 Abbott on Shipping, 6th Am. ed. 401. The exception of the "dangers of the seas" is found in bills of lading as early as the reign of Charles the First. Pickering *v.* Barkley, 1 Style, 132 (1687).

4 The receipts and bills of lading now used by common carriers are well characterized by Judge Redfield as the *ne plus ultra* of the ingenious devices of the common carrier craft in finding some mode of escape from all just responsibility.

5 Smith *v.* Shepherd, Abbott on Shipping, 6th Am. ed. 384. In this case a flood having swept away a part of a bank on which vessels were accustomed to lie in safety, a vessel sunk, one of its masts remaining near the surface. The defendant upon sailing into the harbor struck against this mast, which not giving away forced his boat upon the bank where she struck, and in consequence of the flood having changed the bank, sunk. The defendant was held liable.

vails in England, is in these words: "The act of God, the King's enemies, fire and all and every other danger and accident of the seas, rivers and navigation of whatever nature and kind soever excepted." The phrases "perils of the seas," "perils of the river," "perils of the lake," "dangers of navigation," dangers of the seas,"[1] "dangers of the river," "dangers of the lake," "unavoidable dangers of the river,"[2] "dangers incident to the navigation of the river,"[3] "inevitable accidents," and "unavoidable accidents,"[4] are convertible terms and will be considered together. They are such perils, dangers and accidents as are of an extraordinary nature, and arise from irresistible force which can not be guarded against by the ordinary exertions of human skill and prudence,[5] and which are peculiar to the elements.[6] They are broader than the phrase "act of God," in that they include human agency.[7]

The following have been properly held to be within one or other of these terms: hidden obstructions in a river, such as logs, rocks, snags and the like, which pru-

1 Baxter *v.* Leland, Abb. Adm. 348; Jones *v.* Pitcher, 3 St. & P. 135; 24 Am. Dec. 766.

2 The Favorite, 2 Biss. 502.

3 The Wathan, 13 Opin. Atty. Gen. 119.

4 Fowler *v.* Davenport, 21 Tex. 626; Marsh *v.* Blyth, 1 McCord, 360; Marsh *v.* Blyth, 1 N. & Mc. 170.

5 The Reeside, 2 Sum. 567; Batxer *v.* Leland, 1 Abb. Adm. 448; Bearse *v.* Ropes, 1 Sprague 331; Story on Bailments, § 512; 3 Kent 216; The Niagara *v.* Cordes, 21 How. 7; Tuckerman *v.* Stephens etc. Trans. Co., 32 N. J. (Law) 321; Gilmore *v.* Carman, 1 S. & M. 279; 40 Am. Dec. 96; Turney *v.* Wilson, 7 Yerg. 340; 27 Am. Dec. 515; Gordon *v.* Buchanan, 5 Yerg. 71; Johnson *v.* Friar, 4 Yerg. 48; 26 Am. Dec. 215; Hill *v.* Sturgeon, 28 Mo. 323; Tysen *v.* Moore, 56 Barb. 442. The phrase the "dangers of the seas" has been defined in a very late case as including all unavoidable accidents from which common carriers by the general law are not excused unless they arise from the act of God. Woods, J., in Dibble *v.* Morgan, 1 Woods 406; and see Friend *v.* Woods, 6 Gratt. 189; 52 Am. Dec. 119; but this definition is much too broad and not the law.

6 "This phrase might certainly be construed to mean dangers which arise on the sea, and it would then include every hazard and danger from the beginning to the end of the voyage of whatever kind. But the inclination of the courts is to interpret it as including only dangers which arise from the action of the elements, and those incident to that cause, rather than to include all that arise upon the sea," Merrill v. Arey, 3 Ware 215.

7 McArthur *v.* Sears, 21 Wend. 190.

dence could neither discover nor avoid;[1] a dense fog;[2] a deflection of the compass from accidental or unforeseen causes;[3] the careening of a vessel after her arrival at a wharf, by which water enters her ports;[4] boisterous weather, adverse winds and low tides, causing delay;[5] a sudden squall or gust of wind;[6] the "blowing" of a vessel,[7] or the opening of its seams caused by

1 Turney *v.* Wilson, 7 Yerg. 340; 27 Am. Dec. 515; The Keokuk, 1 Biss. 522; The Favorite, 2 Biss. 502; Redpath *v.* Vaughan, 52 Barb. 489; 48 N. Y. 655; Van Hern *v.* Taylor, 7 Rob. 201; 2 La Ann. 587; 41 Am. Dec. 279; Boyce *v.* Welch, 5 La. Ann. 623; Hostetter *v.* Gray, 11 Fed. Rep. 179; Hibernia etc. Ins. Co. *v.* St. Louis etc. R. Co., 120 U. S. 166; 7 S. C. Rep. 550; Ferguson *v.* Brent, 12 Md. 9; 71 Am. Dec. 583. The rule which imputes carelessness to a captain whose boat strikes a known rock or shoal, unless driven by a tempest (Abbott on Shipping, 258), is only applicable to the navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of the western rivers. There each case must be governed by its own circumstances, and be tested by the course usually pursued by skilful pilots in such cases. Collier *v.* Valentine, 11 Mo. 299; 49 Am. Dec. 81.

2 But a shipper is not excused by the presence of a dense fog, although it is a danger of navigation, if the loss occur through negligence or want of care—as while running at a high rate of speed. The Rocket, 1 Biss. 354; The Portsmouth, 9 Wall. 682.

3 But it must be clearly shown that the officers of the vessel understood and discharged their full duty. The Rocket, 1 Biss. 354.

4 A vessel laden with goods arrived in port and was taken into a dock to discharge her cargo. For this purpose she was fastened by tackle on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The crew was discharged except the mate, and lumpers were being employed in unloading her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got into her ports, and the goods still on board were damaged: *Held*, that this was a loss within the exception in the bill of lading of "all and every the dangers and accidents of the seas and navigation." Laurie *v.* Douglas, 15 M. & W. 746.

5 Lewis *v.* The Success, 18 La. Ann. 1.

6 Slocum *v.* Fairchild, 19 Wend. 329; 7 Hill 292. In The Lady Pike, 2 Biss. 141, where a boat having three loaded barges in tow had approached a bridge in fair weather too closely to back or stop, and was driven against a pier by a sudden and unexpected gust of wind, the owner was held not liable. But in a later case (The Mollie Mohler, 2 Biss. 505 (1871), affirmed 21 Wall. 230 (1874), where the same thing happened to a steamer, the weather being tempestuous, a different conclusion was reached by the same court. Bales of cotton, stowed on a ship's lighter in accordance with the usage of the port, slid off in a sudden gust of wind. The ship received them and gave a clean bill of lading, reciting them to have been received in good order and condition, all concerned having knowledge of the facts. *Held*, that the damage was within the exception in the bill of lading against "perils of the sea." The City of Alexander, 23 Fed. Rep. 826.

7 Crosby *v.* Grinnell, 9 N. Y. Leg. Obsr. 281.

straining during a storm;[1] a loss occasioned by mistaking a shore light on a dark and stormy night;[2] striking against the pier of a bridge;[3] damage by "sweating" of the cargo, not arising from negligent stowage,[4] and damage by other cargo;[5] damage caused to cargo by the shipping of water in a storm;[6] a loss by a jettison occasioned by a "peril of the sea;"[7] or a collision.[8]

1 Rich *v.* Lambert, 12 How. 347; The Polynesia, 30 Fed. Rep. 210; but see Bearse *v.* Ropes, 1 Sprague, 331.

2 The Juniata Paton, 1 Biss. 15.

3 The Morning Mail, 17 Fed. Rep. 545.

4 Clark *v.* Barnwell, 12 How. 272; The Star of Hope, 17 Wall. 651.

5 Goods on a steamer were injured in a gale by a spare propellor, properly stowed and fastened in the same compartment, staving the steamer's side and letting in water, — *Held*, that this was by a "peril of the sea," within an exception in the bill of lading. The Titania, 19 Fed. Rep. 101.

6 A vessel, during a long and stormy voyage, shipped large quantities of water to the injury of a lot of nitrate of soda. The vessel was well dunnaged in the usual manner, and there was no evidence of her unseaworthiness when she started. *Held*, a loss from a "peril of the sea." The Chasca, 23 Fed. Rep. 156. A vessel is not liable for the loss to a cargo of barley caused by the germination thereof, resulting from the damp atmosphere in the hold, caused in turn by the sea water which leaked into the vessel by a peril of the seas. The Blue Jacket, 19 Ben. 248.

7 But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, or of the unseaworthiness of the vessel, the jettison is attributable to that fault or breach of contract, and not to the sea-peril, though that may also be present and enter into the case. Lawrence *v.* Minturn, 17 How. 100; The Portsmouth, 2 Bliss. 56, 9 Wall. 682; The Milwaukee Belle, 2 Biss. 197; Ray *v.* The Milwaukee Belle, 18 Am. L. T. Rep. 311; Nemours *v.* Vance, 19 How. 162; Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745; Bentley *v.* Bustard, 16 B. Mon. 643, 63 Am. Dec. 561. Where the vessel ran aground in sailing up the harbor in pursuit of a pilot boat, and the master broke open heavy casks of liquor to lighten the vessel, instead of throwing them overboard, it was held that the loss might under the circumstances be regarded as a "peril of the sea." Van Syckel *v.* The Ewing, Crabbe, 405. There is nothing unreasonable nor against public policy in providing, in a bill of lading for live beef cattle on deck, that, if necessary, they may be jettisoned for the safety of the ship, without the ship-owner incurring any liability therefor. The Enrique, 5 Hughes, C. Ct. 275.

8 The weight of authority makes a collision a danger of navigation, but failing to make any distinction in the cases, remains inconclusive. The St. Louis, Cincinnati and Chicago, three river boats, start from different points at the same time, carrying boxes of tobacco, the property of A. The bills of lading in each case are alike, excepting "the dangers of the river and navigation." In each case the property is not delivered and A institutes three separate suits against the respective boats. The St. Louis answers, setting up the exception in the bill of lading, and alleging that at a bend in the river during a heavy fog she collided with the Cincinnati and was sunk, neither boat being in fault and everything having been done by the officers on each boat to prevent the collision. This allegation being proved is held a sufficient answer to the action. Plaisted *v.* Boston etc. Navigation Co., 27 Me. 132; The New Jersey *v.* Olcott, 444; Marsh *v.* Blythe, 1 McCord, 360; See Chartered Mer. Bk. *v.* Netherland Steam Nav. Co., L.

No losses, however accidental, can be brought within the exceptions, so as to excuse the carrier, which might have been avoided by the exercise of dis-

R. 9 Q. B. Div. 118. In the proceeding against The Chicago the bill of lading with its conditions are produced, and the loss of the property by a collision with The Cincinnati shown. The evidence shows that the collision was caused by the negligence of the defendant's officers in managing the boat, and could have been avoided by the exercise of due care. A verdict for the plaintiff, A, is held correct. Lloyd *v.* General Iron Screw etc. Co., 3 H & C. 284; 10 Jur. (N. S.) 661; 33 L. J. Ex. 269; 12 W. R. 882; 10 L. T. (N. S.) 586; The City of Norwich, 3 Ben. 575; Grill *v.* General Iron Screw etc. Co., L. R. 1. C. P. 600; 12 Jur. (N.S.) 727; 35 L. J. C., P. 321; 14 W.R. 893; 5 L. R. 3 C. P. 476; 37 L. J. C. P. 205; 16 W. R. 796; 18 L. T. (N. S.) 485. In the proceeding against The Cincinnati the preponderance of testimony establishes that the loss arose through the boat being run down by the negligence of the officers of The Chicago, but without the fault of the defendant. The bill of lading is in form as in the other cases. The defendant has judgment. Van Hern *v.* Taylor, 7 Rob. 201; 41 Am. Dec. 279; 2 La. Ann. 587; Whitesides *v.* Thurlkill, 12 S. & M. 599; 51 Am. Dec. 128; Hays *v.* Kennedy, 41 Pa. St. 378; 80 Am. Dec. 627; Simpson *v.* Hand, 6 Whart. 311; 36 Am. Dec. 231. In the first and second of these cases the conclusions reached are clearly correct—because the danger of accidental collision is known to all who go to sea in ships and because of the oft-repeated principle that the exceptions in a bill of lading can not include negligent acts. But the third case, though supported by all the American authorities, can hardly stand. Not only is it difficult to bring it within the definition of the phrase used, but the reason for the exception is altogether absent. The exception was allowed to a carrier to protect him from the consequence of a disaster occurring in spite of his vigilance, and which would sweep away at one time his own as well as his employer's property. But for the negligent handling of the vessel causing the injury, the injured carrier himself has his remedy over. The American cases contain no mention of this distinction, though in a case decided in England at the beginning of this century where a loss had been caused by an unavoidable collision, and which seems to have escaped the notice of succeeding judges, Lord Kenyon said "that if the defendants had been guilty of any negligence and it could have been proved that the accident could have been prevented, they would certainly have been liable, but they were exempt by the condition of the bill of lading from misfortunes happening during the voyage which human prudence could not guard against—against accidents happening without fault in either party." Buller *v.* Fisher, 3 Esp. 67. Although Lord Kenyon's judgment is very obscurely reported, it must be taken for granted that the parties whom he was of opinion must be free from fault were the masters of the vessels which collided. In a Missouri case, A., a common carrier, which owned a line of barges, contracted with B. to convey certain goods on its barges safely from C. to D., the dangers of navigation and collision excepted; and while A. was getting together its barges in the harbor of C., preparatory to starting them to D., the barge in which B.'s goods had been placed was brought into collision with another of A.'s barges, through the mutual carelessness of two tug-boats belonging to E., but which were in A.'s employ, and at the time engaged in towing said barges, and B.'s goods were damaged. The Court held, that the collision was not an excepted peril, and that A. was liable to B. for the damages which he had sustained. Sun Mut. Ins. Co. *v.* Mississippi Valley Transportation Co., 14 Fed. Rep. 699; s. c. 17 Fed. 919.

cretion and foresight.[1] They release the carrier from losses caused by hidden obstructions newly placed in the river, such as human foresight could not discover and avoid; but if he knows of a new obstruction before an injury is caused by it, he must use increased caution; and if he could by any means have removed it, he will be chargeable.[2]

So, if the goods be badly stowed or put on deck without the owner's consent, the exceptions will not save the carrier.[3]

Where goods are damaged by water arising from an excepted peril, it is the duty of the carrier to exercise ordinary care and diligence to prevent the consequences of the injury, and where it would be of advant-

1 Williams *v.* Branson, 1 Murph. 417 4 Am. Dec. 562; Spencer *v.* Daggett, 2 Vt. 92; Jones *v.* Pitcher, 3 St. & P. 135; 24 Am. Dec. 716; Fairchild *v* Slocum, 19 Wend. 329; Dibble *v.* Morgan, 1 Woods, 406; The Casco, Daveis, 184; The Rebecca, 1 Ware, 188 ; The Montana, 17 Fed. Rep. 377; 22 Id. 715; The Brantford City, 29 Fed. Rep. 373; Browning *v.* The St. Patrick, 14 Phila. 598; Liverpool Steam Nav. Co. *v.* Phoenix Ins. Co., 9 S. C. Rep. 469; Costigan *v.* Michael Trans. Co., 32 Mo. App. 267; Steamboat Co. *v.* Basin, Harp. 262; Hays *v.* Kennedy, 41 Pa. St. 378; 80 Am. Dec. 627; The Ocean Wave, 3 Biss. 317; Whitesides *v.* Russell, 8 W. & S. 44; Richards *v.* Hansen, 1 Fed. Rep. 54; The Bergensexen, 36 Fed. Rep. 700; Chistenson *v.* American Ex. Co., 15 Minn. 270, 2 Am. Rep. 122. Running against a cape or continent can not be termed an "accident of the sea," which proper foresight and skill in the commanding officer might have avoided. Bazin *v.* Steamship Co., 3 Wall. Jr. 229. A loss occasioned by the master of a steamer attempting to enter a port in a dense fog, he not being compelled by any exigency to make the attempt, will not be attributed to "perils of the sea." The Costa Rica, 3 Sawy. 538.

2 Gordon *v.* Buchannan, 5 Yerg. 71; Johnson *v.* Friar, 4 Id. 48.

3 The Rebecca, 1 Ware, 188; The Casco, Daveis, 184; The Newark, 1 Blatch. 203. A bill of lading for a cask of wine receipted for it "in good order and condition," and excepted "the dangers of the seas." On arrival in port, and before being moved from its place in the vessel, it was found to be leaking, with one of its heads crushed in, and a large proportion of the wine had leaked out. In a suit *in rem*, in admiralty, against the vessel, to recover for the value of the lost wine.—*Held*: 1. That the libellant must show negligence in the handling or stowage of the cask. 2. That the condition of the cask on arrival was *prima facie* evidence of such negligence. 3. That the vessel must then show that the damage was not caused by negligence on the part of the vessel. 4. That general evidence as to proper stowage and dunnage, in place, did not show that the head was not crushed in, in handling, after the vessel took charge of it, and that such handling was part of the stowage. The Black Hawk, 9 Ben. 207. Lawrence *v.* Minturn, 17 How. 100; Astrup *v.* Lewy. 19 Fed. Rep. 536; Marx *v.* The Britannia, 34 Fed. Rep. 906.

age, he should open the package and dry the goods; and if such precautionary measures are not taken, the carrier will be liable for the loss.[1]

Subject to these conditions, the following have been held not to be within these exceptions: A dampness or sweating of the hold of a vessel and shown to be the ordinary accompaniment of a voyage from southern to northern ports, and to result not from tempestuous weather but from occult atmospheric causes;[2] the mere rolling of a vessel in a cross sea, an ordinary incident of every voyage;[3] a mere leak not shown to have been caused by the action of the elements;[4] damage caused by rats[5] or other vermin;[6] theft or robbery unless piracy on the high seas;[7] theft or robbery com-

1 Chouteaux *v.* Leech, 18 Pa. St. 224; 57 Am. Dec. 602; Bird *v.* Cromwell, 1 Mo. 81; 13 Am. Dec. 470; The Nith, 36 Fed. Rep. 86; Steamboat Co. *v.* Basin, Harp. 262; Phelan *v.* The Alvarado, 2 Am. L. J. 332; West *v.* The Berlin, 3 Iowa. 532.

2 Baxter *v.* Leland, Abb. Adm. 348.

3 The Reeside, 2 Sum. 567.

4 The Emma Johnson, 1 Sprague, 527; The Compta, 4 Sawy. 375.

5 The Isabella, 8 Ben. 139; Kay *v.* Wheeler, 36 L. J. C. P. 180, L. R. 2 C. P. 302, 15 W. R. 495, 16 L. T. (N. S.) 66; Laveroni *v.* Drury, 22 L. J. Ex. 3, 8 Ex. 166, 16 Jur. 1024. Loss or damage by rats is not an act of God, nor a danger or accident of the sea; the fact of damage by rats is sufficient evidence that sufficient care and skill were not exercised to rid the vessel of rats. The Carlotta, 9 Ben. 1; Pandorf *v.* Hamilton, L. R. 17; Q. B. Div. 670 (1886). In this case the action was brought by shippers of rice for damages done to it, in the course of carriage in the defendants' ship. The rice was shipped under bills of lading which contained an exception of 'dangers and accidents of the seas.' During the voyage, rats gnawed through a metal pipe connected with the bath-room, and the sea-water, escaping from the pipe, damaged the rice. The loss was held not within the exception. Where the master of a vessel received skins to be carried from New Orleans to New York, there to be delivered in good order, the "dangers of the seas" excepted, and the skins were injured by rats, the court refused to admit evidence to show that according to mercantile usage and understanding injuries by rats were considered and treated as dangers of the sea. Aymar *v.* Astor. 6 Cow. 266; See Garrigues *v.* Coxe, 1 Binney, 592.

6 Cockroaches ate off and defaced the paper labels pasted on the outside covering of chests of tea, which injury embarrassed the assortment and delivery of the goods to the consignees and depreciated their market value. *Held*, that the damages were not the result of a "peril of the sea" or of any of the "dangers or accidents of navigation," within an exception to that effect in a bill of lading but were damages for which the ship and its owners were liable as insurers of the safe conveyance of the cargo. The Miletus, 5 Blatchf. 335.

7 King *v.* Shepherd, 3 Story 349; Tenterden on Shipping, pt. 3, c. 3, § 9, p. 244; Abbott on Shipping, pt. 3, c. 4, § 1, p. 252.

mitted by persons coming on board the ship by consent of the master when she is not on the high seas, or by persons on board;[1] depredations on the ship's stores or cargo committed by her passengers or crew in consequence of a short allowance made necessary by the length of the voyage;[2] the barratrous act of the crew in boring holes in the ship for the purpose of scuttling her;[3] embezzlement;[4] plundering of the ship by a custom house officer while in charge of it;[5] the unskillfulness of the pilot;[6] the desertion or insubordination of seamen;[7] an accidental fire;[8] the explosion of a boiler of a steamship;[9] low water in a river;[10] the

1 King *v.* Shepherd, 3 Story 349.

2 The Gold Hunter, Blatchf. & H. 300.

3 The Chasca, L. R. 4 Adm. 446, 23 L. T. 838, 44 L. J. Adm. 17.

4 King *v.* Shepherd, 3 Story 349.

5 Schieffelin *v.* Harvey, Anth. 56, 6 Johns. 170; 5 Am. Dec. 206.

6 Harvy *v.* Pike, N. C. Term Rep. 82; 7 Am. Dec. 698.

7 The Ethel, 5 Ben. 154.

8 Gilmore *v.* Carman, 1 S. & M. 279; 40 Am. Dec. 96. Sharkey, C. J.: "It is not a danger which proceeds from or is peculiar to the river. It arises from the means used in propelling the boat, and not from any obstacle or impediment in the river. The boat itself is the depository of the agent which produces its own destruction. If the owner chooses to employ this agent he can not with propriety say that it is productive of a danger incident to the navigation of the river. This is a danger produced by human agency; it may be counteracted by human sagacity and prudence." See also Garrison *v.* Memphis Ins. Co., 19 How. 312; Merrill *v.* Arey, 3 Ware 215; Cox *v.* Peterson, 30 Ala. 608; Union Mutual Ins. Co. *v.* Indianapolis etc. R. Co., 1 Disney 480. It is held in Alabama that a carrier may show by parol that an exception of "dangers of the river" as embodied in a bill of lading by usage and custom includes dangers of fire. Hibler *v.* McCartney, 31 Ala. 501; Sampson *v.* Gazzam, 6 Port. 123; Ezell *v.* Miller, *Id.* 307; Ezzell *v.* English, *Id.* 311; McClure *v.* Cox, 32 Ala. 617; Jones *v.* Pitcher, 3 St. & P. 135. But this is contrary to the weight of authority.

9 The Mohawk, 8 Wall. 153. For perils arising on the sea are not necessarily perils arising from the sea. The Edwin, 1 Sprague 477; Bulkley *v.* Naumkeag Steam Cotton Co., 1 Cliff. 222 24 How. 386 (1860), *contra*, Adams Express Co. *v.* Fendrich, 38 Ind. 150.

10 Danger of navigation does not mean want of navigation. Cowley *v.* Davidson, 13 Minn. 92. "The obligation of this common carrier under this bill of lading was to deliver the goods at Shreveport without unnecessary delay, in good order and condition, unto the consignees or assigns, they paying the specified freight and no more, the dangers of the river and fire only excepted. Low water is not to be classed among the dangers of the river which absolve the carrier from this conventional obligation." Hatchett *v.* The Compromise, 12 La. Ann. 783; Broadwell *v.* Butler, 1 Newb. 171, 6 McLean 296; Mahon *v.* The Olive Branch, 18 La. Ann. 107; *contra*, Transportation Co. *v.* Downer, 11 Wall 129. An exception of "dangers of the river" will not cover the case of a loss of goods by fire in a warehouse where they had been deposited by the carrier

shifting of a buoy;[1] an injury to cargo occasioned by contact with other cargo;[2] or by want of ventilation;[3] or by coal dust;[4] or a failure to proceed on the voyage on account of the outbreak of war,[5] or the seizure of the goods and ship by officers of the law.[6]

§ 167. **"Deficiency in Quantity."**—A stipulation in a bill of lading that "any damage or deficiency in quantity, the consignee will deduct from the balance of freight due the carrier," does not import a guaranty that the carrier has received the whole quantity of goods specified therein, nor an agreement to pay for any portion which may be deficient. The words "deficiency in quantity" relate to the property shipped, and not to the amount as contained in the bill of lading.[7] But the contrary was held where the language of the bill of lading was that "all the deficiency in the cargo shall be paid for by the carrier, and deducted from the freight, and any excess in the cargo shall be paid for to the carrier by the consignee."[8] In Illinois, where a bill of lading contained this clause, "all the deficiency in cargo to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee," it was held, that money paid the carrier by the consignee on

on account of low water in the river which prevented his vessel from prosecuting the voyage to the place of destination. Cox *v.* Peterson, 30 Ala. 608.

1 Reeves *v.* Waterman, 2 Speers, 197.

2 The Antoinette C., Ben. 564; see Daggett *v.* Shaw, 3 Mo. 264; The Freedom, L. R. 3 P. C. 594, 24 L. T. (N. S.) 452.

3 The Freedom, L. R. 3 P. C. 594, 24 L. T. (N. S.) 452.

4 Filberts in bags were stowed against a movable bulk-head separating the compartment from the coal bunkers, through which an extraordinary amount of coal dust penetrated, and injured the nuts. The bulk-head was covered by Chinese matting, which is often used for such purposes; but canvas is equally used, and is better, because tighter. *Held*, that coal dust is not a peril of the sea and the ship is liable. Hills *v.* Matchill, 36 Fed. Rep. 702.

5 The Patria, L. R. 3 Adm. 436, 24 L. T. (N. S.) 849.

6 Spence *v.* Chadwick, 10 Q. B. 517, 11 Jur. 872.

7 Meyer *v.* Peck, 28 N. Y. 590; Abbe *v.* Eaton, 51 N. Y. 410.

8 Merrick *v.* Certain Bushels of Wheat, 3 Fed. Rep. 340.

account of such excess, belonged to the shipper, and not to the carrier.[1] So, where a bill of lading stipulated that the full quantity of grain mentioned therein should be delivered, any deficiency to be paid for by the carrier, "and any excess to be paid for to the carrier by the consignee," it was held that the excess did not belong to the carrier, but that the consignee was bound to pay freight on it.[2]

§ 168. **"Extraordinary Marine Risk."**—Where a vessel struck upon the fluke of a sunken anchor in the harbor, and was sunk, it was held that the risk which the vessel thus incurred was not an "extraordinary marine risk" within the meaning of the charter-party. It was an ordinary risk, which every vessel that enters a harbor runs, and which every marine policy covers.[3]

§ 169. **"Fire."**—In a bill of lading of a steamboat the word "fire" means any fire, and is not restricted to fire originating from the boat's furnace.[4] It includes, as a rule, a loss by fire while the goods are on the wharf awaiting shipment, and while on the wharf after unloading, as well as while on the vessel.[5] An exemption from liability from fire on "lakes or rivers," will not absolve the carrier, when part of the carriage is by land and the goods are burned on a railroad, or in a railroad depot.[6]

§ 170. **"Good Order and Condition."**—The recital in a bill of lading that the goods were received in "good order and condition," refers generally to their

[1] Wallace *v.* Long, 8 Ill. App. 504.
[2] Ford *v.* Head, 34 Hun. 146.
[3] Leary *v.* United States, 14 Wall. 607.
[4] Swindler *v.* Hilliard, 2 Rich. (S. C.) 216; see Colton *v.* R. Co., 67 Pa. St. 211.
[5] Scott *v.* Balt. etc. Steamboat Co., 19 Fed. Rep. 56; The Egypt, 25 Fed. Rep. 320; see St. Louis etc. R. Co. *v.* Bone, 11 S. W. Rep. 958 (Ark.)
[6] Baxter *v.* Wheeler, 49 N. H. 9; Little Rock etc. R. Co. *v.* Talbot, 39 Ark. 523.

external appearance; the carrier is not concluded by his statement, but may explain or contradict it by parol evidence.[1] The presumption, however, is that not only the package, but the contents were in good order when received, and the burden of proof is on him to show that the facts are not as his receipt has admitted,[2] which proof must be of a most satisfactory character.[3] The scent of camphor in teas so strong as to be readily perceived in handling the boxes, is an external mark of their condition, and therefore, the re-

1 Bradstreet *v.* Heran, 2 Blatchf. 116; The Nith, 36 Fed. Rep. 86; The California, 2 Sawy. 12; Keith *v.* Amende, 1 Bush, 455; Barrett *v.* Rogers, 7 Mass. 297; 5 Am. Dec. 45; The Missouri *v.* Webb, 9 Mo. 193; Tierney *v.* R. Co., 10 Hun, 569; Archer *v.* The Adriatic, 9 Cent. L. J. 201. Gauche *v.* Storer, 14 La. Ann. 411; Richards *v.* Doe, 100 Mass. 524; The Oriflamme, 1 Sawy. 176; The Black Warrior, 1 McAll, 181; Bissell *v.* Price, 16 Ill. 408; Seller *v.* The Pacific, 1 Oreg. 409; Arend *v.* Liverpool S. S. Co., 6 Lans. 451; 54 Barb. 113; Carson *v.* Harris, 4 G. Greene, 516; Mitchell *v.* United States Express Co., 46 Iowa, 214; West *v.* The Berlin, 3 Iowa 532; The Freedom, L. R. 3 P. C. 594; The Olbers, 3 Ben. 148; Vaughan *v.* Six Hundred and Thirty Casks, 7 Ben. 506; Austin *v.* Talk, 20 Tex. 164; Currell *v.* Johnson, 12 La. 290; 32 Am. Dec. 117; Witzler *v.* Collins, 70 Me. 290; 35 Am. Rep. 327. In Gowdy *v.* Lyon, 9 B. Mon. 112, it is said: "The adoption of the principle that the bill of lading is conclusive on the carrier, not only as to the apparent but also as to the actual condition of goods, would impose on him the necessity, for self-protection, of opening every box of merchandise to examine and ascertain the condition of its contents before he receives it. This would not only be inconvenient but impracticable on the part of steamboat owners, on account of the vast carrying business on the rivers. The injury that would be inflicted on the owners of the freight by the process that it would be subjected to in consequence of such a requisition is also a cogent argument against it. The bulk of every package would have to be broken up and examined, and the contents of every box of merchandise of the most delicate texture opened and handled before a bill of lading could be safely signed. Public policy, therefore, prohibits a rule which would be productive of such results, and which, instead of benefiting, would inflict an injury upon the community."

2 Price *v.* Powell, 3 N. Y. 332; Nelson *v.* Stephenson, 5 Duer. 538; The Martha, Olcott, 40; The Zone, 2 Sprague 19; The Historian, 28 Fed. Rep. 336.

3 See Wheel. Carr. 290, criticising Bond *v.* Frost, 8 La. Ann. 297; Montgomery *v.* The Abby Pratt, 6 La. Ann. 410. Mr. Wheeler (Carriers 290) says: "The weight of authority however is against the proposition that the admission in question if not qualified relates only to the external appearance of the goods. The clause "value and contents unknown" and similar clauses were undoubtedly introduced into bills of lading to protect the carrier from the presumption referred to and it is certainly going a great way to maintain that where the carrier receipts for the goods in good order without any clause of limitation he can claim that all this means is that the box was in good order," citing The Howard *v.* Wissman, 18 How. 231. The word "apparent" before the word good does not change the effect. The Oriflamme, 1 Sawy. 176.

cital in the bill of lading that they were received in good order, is evidence that they were not so scented when shipped.[1] A contract to deliver bales of cork wood in "good condition" is not broken by their necessary cutting for the purpose of conveniently stowing them.[2]

§ 171. **Invoice Value.** — When the damage to be recovered is restricted to the "invoice value" of the goods, it will be computed in the usual way up to that value, irrespective of their market value, as damaged, at the port of destination.[3]

§ 172. **"Leakage and Breakage."**—The word "leakage" being intended to protect the carrier from liability to compensate the owner of the goods for the waste occasioned by leakage, does not extend to damage caused by the liquid, to other goods. So "breakage" will not cover damage done by the broken goods to other goods.[4] Nor will "leakage" cover a loss caused by persons tampering with the casks for the purpose of extracting some of the contents.[5] In England, negligence being absent, the condition as to leakage, extends to all leakage, whether ordinary or extraordinary.[6] But in the United States, such a con-

1 The T. H. Goddard, 12 Fed. Rep. 175.

2 Carao *v.* Guimaraes, 14 Phila. 614.

3 Brown *v.* Cunard S. S. Co., 147 Mass. 58; 16 N. E. Rep. 717.

4 Thrift *v.* Youle, L. R. 2 C. P. Div. 432.

5 The Giglio *v.* The Britannia, 31 Fed. Rep. 432.

6 Ohrloff *v.* Briscall, L. R. 1 P. C. 231; 4 Moore P. C. C. (N. S.) 70; The Helene, B. & L. 429. Turner, L. J., saying: "On the argument different views were suggested by counsel as to the meaning of the word 'leakage.' For the respondents it was contended that the word means only ordinary leakage (which according to the evidence amounts to one per cent.), and does not extend to extraordinary leakage, such as that in question, amounting to an alleged deficiency of 2,000 gallons. * * * * The learned judge of the admiralty court appears to have adopted the construction of the word 'leakage' contended for by the respondents. * * * But we do not think such a construction allowable. The condition that the shipowners are not to be accountable for leakage does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage; and on principle, therefore, we do not think it would be justifiable to add any such limit to its terms. Nor are we aware of any authority for doing so."

dition does not allow the carrier to deliver empty casks. The ordinary signification of "leakage," it is very properly said, is the loss of a part, not the whole.[1]

§ 173. **"On Lakes or Rivers."**—Damage "on the lakes or rivers" means in the navigation of the lakes and rivers, and accordingly where a quantity of wheat was lost by the sinking of a wharf boat on which it was stored, awaiting the arrival of the packet on which it was to be shipped, the loss was not within the exception.[2]

§ 174. **"Pilot, Master or Mariners."**—Exemption from liability for the acts of pilot, master or mariners does not include the negligence of stevedores employed by them to unload the vessel,[3] or a carman authorized by the consignee to receive the goods.[4] But the purser of a vessel is a "mariner."[5]

§ 175. **"Port of Discharge."**—The words "port of discharge" in a clause in a bill of lading requiring claims for loss or damage to be made to the agent of the carrier at the "port of discharge" refer to the port to which the goods, for a loss whereof a claim is made, were shipped.[6]

§ 176. **"Privilege of Re-shipping."**—The "privilege of re-shipping" is reserved in a bill of lading to allow the carrier to re-ship the goods in another boat, without rendering him responsible for the conse-

1 Brauer *v.* The Almoner, 18 La. Ann. 266; Thomas *v.* The Morning Glory, 13 La. Ann. 269; 71 Am. Dec. 509; Arend *v.* Liverpool etc. Steamship Co., 6 Lans. 459; 64 Barb. 118.

2 St. Louis etc. R. Co. *v.* Smuck, 49 Ind. 302.

3 Zung *v.* Houland, 5 Daly 136.

4 Guillaume *v.* Hamburg etc. Packet Co., 42 N. Y. 212; Gleadell *v.* Thompson, 56 N. Y. 194.

5 Spinette *v.* Atlas Steam. Co., 80 N. Y. 71; 36 Am. Rep. 579, reversing s. c. 14 Hun. 100.

6 Knoll *v.* U. S. etc. Steamship Co., 33 N. Y. (S. C.) 423.

quences of a deviation.[1] But it does not discharge the boat from any liability not excepted in the contract; and though the right is secured of trans-shipping on another boat, the liability continues until the goods are safely delivered at the port of destination, if under the like circumstances the carrier would be liable had the loss occurred on his own boat.[2] It is a privilege reserved to the boat and not an additional undertaking of the carrier.[3] It is not, therefore, a breach of his contract, if, by reason of low water, his boat is obstructed and he fails to deliver the goods, which by re-shipping he might have delivered.[4] But the clause only gives power to transfer to another boat, and will not authorize a temporary storing of the goods on a wharf-boat at the point of re-shipment.[5] The additional expense of re-shipping is to be borne by the vessel on which the goods were first sent.[6]

§ 177. **"Quantity Guaranteed."** — The words "quantity guaranteed," in a bill of lading of grain,

1 But where a carrier receives goods to be conveyed with "privilege of re-shipping," and the goods are re-shipped on a boat which deviates from her route, the carrier is liable. Little *v.* Semple, 8 Mo. 99; 40 Am. Dec. 123.

2 Carr *v.* The Michigan, 27 Mo. 196; 72 Am. Dec. 196; Little *v.* Semple, *supra.* "It is but a privilege to the carrier in the execution of his contract to convey and deliver, inserted for his own benefit, to secure him the advantage of as great a portion of freight as he could earn, and to throw upon the owner any increase of expense. The relation of carrier continues from the shipment of the goods until their arrival at the destined port and delivery." Cassilay *v.* Young, 4 B. Mon. 265; 99 Am. Dec. 805; Mcgregor *v.* Kilgore, 6 Ohio 358; 27 Am. Dec. 269; Whitesides *v.* Russell, 8 W. & S. 44; Dunseth *v.* Wade, 3 Ill. 285. A undertook to ship a lot of fruit from Trieste to New York, *via* Palermo. He had the right to trans-ship at Palermo on one of his own ships, which was loaded when the fruit arrived there. Instead of trans-shipping by another line, he kept the fruit there for fifty-five days, and it became damaged. *Held*, that A was liable. Mina *v.* I. & V. Florio S. S. Co., 23 Fed. Rep. 915.

3 Goods were shipped from New Orleans to Cincinnati, under bills of lading in the usual form, undertaking for their delivery, and containing the words "privilege of re-shipping." At the Ohio Falls the boat waited a month before there was water enough to carry her over. *Held* that it was competent to show by usage that under these words as used in a bill of lading, it was not the carrier's duty to re-ship instead of waiting for a rise. Broadwell *v.* Butler, 1 Newb. 171; 6 McLean 296.

4 Sturgess *v.* The Columbus, 23 Mo. 230.

5 Carr *v.* The Michigan, 27 Mo. 196; 72 Am. Dec. 257.

6 Hatchett *v.* The Compromise, 12 La. Ann. 783.

mean that the bill of lading is conclusive evidence of the amount of grain to be delivered, and if it falls short the carrier will pay for the shortage. In *Bissel* v. *Campbell*,[1] it is said: "There has been considerable litigation in the courts growing out of the claims of consignees against carriers for shortage, and it must always be difficult to show whether the shortage was occasioned by the misconduct of the carrier or some mistake in the measurements. Hence, some years since, the clause was inserted in bills of lading upon the canals, that the consignee might make a deduction from the freight on account of shortage in substantially the form contained in the bill of lading in the case of *Meyer* v. *Peck*.[2] It seems to have been supposed that such a clause would make the carrier responsible for the quantity specified in his bill of lading, but the Court of Appeals held otherwise, and recently the words 'quantity guaranteed' have been inserted."

§ 178. **"Ready to Discharge."**—A vessel is not "ready to discharge" within a bill of lading providing that all goods are "to be taken from alongside immediately she is ready," etc., when she cannot discharge without destroying them. It was so held, as to a consignment of oranges arriving in New York, when the weather was below zero, and discharged against the consignee's protest.[3] But a provision of a bill of lading that the ship may discharge fruit when she is ready, and that the goods shall thereafter be at the consignee's risk, is a reasonable stipulation, and valid, so far as to permit the discharge of so much green fruit as can be removed by the consignee during the day, out of danger from frost at night, providing

1 54 N. Y. 353.
2 28 N. Y. 590.
3 The Aline, 19 Fed. Rep. 875.

the consignee is given timely notice of the discharge and opportunity to take care of his goods, and not otherwise.[1]

§ 179. **"Restraints of Princes."**—An exception in a bill of lading of acts or restraints of princes and rulers, refers to the forcible interference of a State or the government of a country taking possession of the goods by strong hand, and does not extend to legal proceedings in the courts of a foreign country.[2]

§ 180. **"Robbers" and "Thieves."**—Robbery is distinguished from theft in containing the elements of force or fear. The word "robbers" in a bill of lading will not protect the carrier where the goods are stolen from him.[3] And "thieves" is restricted to thieves external to the ship, and will not exempt the carrier from liability for theft committed by one of the crew or a passenger,[4] or where, after the goods are constructively delivered to the consignee they are given out of the custody of the carrier, to one who receives them with intent to steal them.[5] Where money is stolen from a carrier, under such a state of facts as will exonerate him from liability for the loss, the carrier will, nevertheless, be answerable for the money in *indebitatus assumpsit*, if he has recovered it from the thief.[6] The exception of loss by thieves or robbers is generally a protection unless it be shown that there was negligence on the part of the ship, which contributed to the theft or facilitated it.[7]

1 Bonanno *v.* The Baskenna Bay, 36 Fed. Rep. 697.

2 Finlay *v.* Liverpool Steamship Co., 23 L. T. N. S. 251.

3 DeRothschild *v.* Royal Mail Steam Packet Co., 7 Ex. 734, 21 L. T. Ex. 273.

4 Taylor *v.* Liverpool etc. Steam Co., L. R. 9 Q. B. 546; 43 L. J. Q. B. 205; 22 W. R. 752; 30 L. T. (N. S.) 714.

5 Tarbell *v.* Royal Ex. Ship.Co., 110. N. Y. 1711; 6 Am. St. Rep. 350; 17 N. E. Rep. 721.

6 St. John *v.* Express Co., 1 Woods 612.

7 The Saratoga, 20 Fed. Rep. 869.

§ 181. **"Tow and Assist Vessels."**—Liberty given a vessel to call "at any port or ports," or to tow and assist vessels "in all situations," refers to ports along the course of the voyage specified, or vessels met with in the ordinary course of such voyage. Where a vessel, after loading, proceeds 40 miles directly out of her course to take in tow a disabled vessel, and is detained about seven days, it is an unjustifiable deviation.[1]

§ 182. **"Value and Contents Unknown."**—These words in a bill of lading exclude the inference of any admission by the carrier as to the quantity or quality of the contents of the package at the time of delivery, beyond what is visible to the eye or apparent from handling it—nothing is implied but the receipt of the property in good order externally, and the carrier may show by parol that the value and contents were below the estimate placed upon them by the shipper.[2] The effect of these words is to qualify the admission made that they were "received in good order and condition," and to shift the burden of proof as to the condition of the contents when received.[3] The carrier has complied, *prima facie*, with his contract when he has delivered the box or case or other article externally in good condition. The burden of proof is then upon the shipper to show that the contents were in good order and condition when shipped;[4] that the quantity claimed to have been shipped was actually shipped and that the non-delivery resulted from negligence.[5] And

1 Ardan S. S. Co. *v.* Thebaud, 35 Fed. Rep. 620. See Stuart *v.* British etc. Steam Co., 32 L. T. (N. S.) 257.

2 The California, 2 Saw. 12; The Colombo, 3 Blatchf. 521; Clark *v.* Barnwell, 12 How. 272; St. Louis etc. R. Co. *v.* Knight, 122 U. S. 79; 7 S. C. Rep. 1132; Matthiessen etc. Co. *v.* Gusi, *post;* Miller *v.* R. Co., 90 N. Y. 430; 43 Am. Rep 179.

3 Wheel. Carr., 291.

4 Wentworth *v.* The Realm, 16 La. Ann. 18.

5 The Venner, 27 Fed. Rep. 523; The Nora, 14 Fed. Rep. 429; The Bermuda, 27 Fed. Rep. 476; The Ismaele, 14 Fed. Rep.

the shipper may also show that the goods were of a greater value than described.[1]

Conditions and Exceptions Peculiar to Carriage by Land.

There are other exceptions and conditions found nearly always in contracts for the carriage of goods by land, as for example:

§ 183. **"All Rail."**—Where the goods are to be carried "all rail," the carrier is absolutely liable if there is any deviation, as where the goods are carried by sea,[2] or by any other mode but by rail even for a few miles.[3] But a necessary crossing of water by ferry is allowed.[4]

§184. **"Article."**—A notice that the carrier will only be liable for $100 on any article, will make him liable to that amount for each one of the articles contained therein, where the property receipted for is a trunk.[5] But as a trunk is generally used to carry a collection of articles of different kinds, the reason of this ruling does not extend to a box or other package.[6]

491. Matthiessen etc. Co. *v.* Gusi, 29 Fed. Rep. 794; Abbott *v.* Nat. S. S. Co., 33 Fed. Rep. 895; Eaton *v.* Newmark, 33 Fed. Rep. 891; The Vincenzo T., 10 Ben. 228.

1 Fassett *v.* Ruark, 3 La. Ann. 694; Lebeau *v.* Gen. Steam Nav. Co., L. R. & C. P. 88.

2 Bostwick *v.* R. Co., 45 N. Y. 712.

3 Maghee *v.* R. Co., 45 N. Y. 514.

4 Maghee *v.* R. Co., *supra.*

5 Earl *v.* Cadmus, 2 Daly 237; Hopkins *v.* Westcott, 6 Blatchf. 9.

6 Wetzell *v.* Dinsmore, 54 N. Y. 496. In this case the carrier received at New York for transportation to plaintiffs at St. Louis, a package containing three gross or cases of "Shallenberger's pills," worth $113.50 per gross. The receipt or bill of lading contained a clause that the holder should not demand more than $50 for any loss or damage, "at which the *article forwarded* is valued, and which shall constitute the limit of the liability of the company." The three cases were each separately addressed to plaintiffs and were then wrapped up with a proper cover in a single package similarly addressed. Only one of the cases reached the plaintiffs. An action was brought to recover for the loss, and it was held that "the article forwarded" was the single package, and that plaintiffs were not entitled to recover $50 upon each of the missing cases; the Court saying that if each of the three boxes had contained a different sort of thing and the defendant had known of this the case would have been altered.

§ 185. **"C. O. D."**—The letters "C. O. D." refer to the value or price of the package which, as marked on it, is to be collected on delivery, and transmitted to the consignor.[1] They have nothing to do with the transportation charges,[2] nor do they affect the character of the shipment. The duty to transport safely remains the same. But if the consignee neglects or refuses to take the property and pay the money, the former remains in the carrier's hands, subject only to his liability as a warehouseman.[3] If a carrier of goods marked C. O. D. takes the consignee's check on delivering the goods, and the consignor receives the check from the carrier without objection, and it turns out that there are no funds, the carrier is not liable.[4] But when a bill of lading requires the carrier to collect charges upon the goods on delivery, if the carrier delivers the goods without collecting the sum due, he becomes liable therefor himself.[5] A receipt as for a package not sent C. O. D., given for a package ordered sent C. O. D., operates as a refusal to send the package C. O. D.[6]

§ 186. **"Depot."**—The word "depot" in a clause exempting the carrier from "unavoidable accidents of the railroad and of fire in the depot," is a broad one, and includes every place where the carrier is accustomed to receive, deposit and keep ready for transportation or delivery, goods and merchandise.[7] Where goods are to be forwarded to a certain "depot,"

1 Brooks *v.* Am. Ex. Co., 14 Hun. 364. United States Express Co. *v.* Keefer, 59 Ind. 263; American etc. Express Co. *v.* Schier, 55 Ill. 140; American Express Co. *v.* Lesem, 39 Ill. 312; Collender *v.* Dinsmore, 55 N. Y 200; 14 Am. Rep. 224; Lane *v.* Chadwick, 146 Mass. 68.

2 Am. Express Co. *v.* Schier, 55 Ill. 140.

3 Gibson *v.* Am. Express Co., 1 Hun, 387.

4 Rathbun *v.* Steam Co., 57 How. Pr. 191.

5 Meyer *v.* Lemcke, 31 Ind. 208; Murray *v.* Warner, 55 N. H. 546; 20 Am. Rep. 227; see Tooker *v.* Gormer, 2 Hilt 71.

6 Smith *v.* South. Ex. Co., 16 South Rep. 62.

7 Maghee *v.* R. Co., 45 N. Y. 514; see Hall *v.* R. Co., 14 Phila. 414; Stanard Milling Co. *v.* White Line Co., 26 S. W. Rep. 704 (Mo.).

this excuses a personal delivery, but does not relieve the carrier from the duty of properly caring for them after their arrival.[1]

§ 187. **"Feed, Water and Take Proper Care."**—A stipulation in the carriage of stock that the owner or shipper will "feed, water and take proper care of" them, relieves the carrier from liability for an injury caused by the want of food, water and care in the keeping.[2]

§ 188. **"Fire."**—Where a loss by fire is exempted, and the goods are burned by a mob, the carrier is excused.[3]

§ 189. **"Household Goods."**—An agreement to transport "household goods" includes every thing of a permanent nature that is used or purchased or otherwise acquired by a person for his home, but not articles purchased or kept for consumption.[4]

§ 190. **"Load and Unload."**—A provision that the shipper will "load and unload" the stock at his risk, places upon him the risk of damage to his property or himself from the manner of loading or unloading.[5] It does not, however, place any responsibility upon him during the transit,[6] nor include personal injuries which he may sustain from external causes, as

1 Merchants Desp. Co. *v.* Merriam, 111 Ind. 5; 11 N. E. Rep. 954.

2 Central R. Co. *v.* Bryant, 73 Ala. 722.

3 Hall *v.* R. Co., 14 Phila. 414; Wertheimer *v.* R. Co., 17 Blatchf. 421, 1 Fed. Rep. 232. A statute making a railroad liable to any person whose buildings or property are destroyed or injured by fire communicated by its locomotives does not apply to goods in the hands of the railroad or carrier or warehouseman at the time of their destruction. Bassett *v.* R. Co., 145 Mass. 129; 13 N. E. Rep. 370. But it does include goods which have left the carrier's hands and are stored in a warehouse leased by the owner from the railroad. Blaisdell *v.* R. Co, 145 Mass. 132; 13 N. E. Rep. 373.

4 Smith *v.* Findley, 34 Kas. 316; 8 Pac. Rep. 871.

5 Meuer *v.* R. Co., 59 N. W. Rep. 945, (S. D.).

6 Indianapolis etc. R. Co. *v.* Allen, 31 Ind. 394.

for example, being run into by another train while so engaged;[1] nor does it relieve the carrier from negligence.[2] It does not embrace loading or unloading on the way,[3] and it confers no right on the shipper to decide when and where the loading or unloading shall take place, but rather imposes the duty on him to do so whenever, in the opinion of the carrier, it is necessary.[4]

§ 191. **"Loss."**—A delivery of the goods by the carrier to a person not entitled to receive them, is not a "loss,"[5] nor is a non-delivery or conversion of them,[6] or damage or deterioration while in transit.[7]

§ 192. **"On the Train."**—An exemption of liability for injuries while "on the train," is not restricted to the time when the passenger is actually riding in the car, but protects the company while he is on the station platform, going from one car to another.[8] But the phrase "riding free" in a contract that "persons riding free to take charge of the stock, do so at their own risk of personal injury," does not cover an injury to one while engaged in loading the stock, and who it did not appear was to take passage on the train.[9]

§ 193. **"Package or Thing."**—Under an agreement exonerating a carrier from liability for more than a certain amount upon a "single package," each package among a number inclosed in a box, which the carrier knows to contain such packages, is to be re-

1 Stinson *v.* R. Co., 32 N. Y. 333.
2 Hawkins *v.* R. C., 17 Mich. 57; Sisson *v.* R. Co., 14 Mich. 487; Bills *v.* R. Co., 84 N. Y. 5.
3 Penn. *v.* R. Co., 49 N. Y. 204.
4 McAlister *v.* R. Co., 74 Mo. 351.
5 Balt. etc. R. Co. *v.* McWhinney, 36 Ind. 436.
6 Porter *v.* South. Ex. Co., 4 S. C. 135; Erie Dispatch Co. *v.* Johnson, 11 S. E. Rep. 441 (Penn.); Bardwell *v.* Am. Ex. Co., 35 Minn. 344; 28 N. W. Rep. 925.
7 Heil *v.* R. Co., 16 Mo. (App.) 363.
8 Poucher *v.* R. Co., 49 N. Y. 263, and see Gallin *v.* R. Co., L. R. 10 Q. B. 312.
9 Stinson *v.* R. Co., 32 N. Y. 333.

garded as an independent package.[1] The word "package" is defined by the Supreme Court of Alabama as a small parcel or bundle whose appearance gives no adequate information of its contents. A hogshead of tobacco or a bale of cotton would not come within the term,[2] nor would 70,000 lbs. of corn in bulk.[3] In a recent case in Illinois, three bales of furs were delivered to an express company for transportation, the receipt given by the company limiting its liability to $50 for any loss or damage to any "box, package or thing," unless the just and true value thereof was therein stated. It was held that the shipper, even though no disclosure of the value had been given, was entitled to recover $50 on each of the three bales.[4]

§ 194. **"Perishable Property."**—Is that which from its nature, decays in a short space of time without reference to the care it receives. Of that character are many varieties of fruits, some kinds of liquors, and numerous vegetable productions. But not goods which, with reasonable care can be preserved for many years.[5]

§ 195. **"Place of Destination."**—The "place of destination" is not the point on the carrier's route where he is to deliver the goods to another carrier, but is the ultimate destination—that point on the road of the first or connecting carrier at which the consignee is to receive the goods, according to the usual course of business.[6] And an exemption from liability after property arrives at its "place of destination," leaves

1 Read *v.* Spaulding, 5 Bosw., 395; see Wyld *v.* Pickford, 8 M. & W. 443.

2 Southern express Co. *v.* Crook, 44 Ala. 468.

3 Rosenstein *v.* R. Co., 16 Mo. (App.) 225; see McCoy *v.* Western Trans. Co., 42 Md. 498.

4 Boskowitz *v.* Adams Ex. Co., 9 Cent. L. J. 389.

5 Ill. Cent. R. Co. *v.* McClellan, 54 Ill. 58.

6 Ayers *v.* R. Co. 14 Blatchf. 9.

the carrier still liable for delivering it to the wrong person.[1] Otherwise, such a stipulation is valid, and the carrier's liability continues thereafter as that of a warehouseman only.[2]

§ 196. **"Through Without Transfer."** — These words in a bill of lading are construed strictly; and a transfer of goods from a car to a warehouse for a temporary purpose is held to amount to a breach of the contract.[3]

§ 197. **"Transit."**—A release of a railroad from liability for "damage to goods while in transit," will not extend to a total loss of them by fire while in the company's warehouse at an intermediate station.[4]

§ 198. **"Unavoidable" or "Inevitable" Accident.** —We have seen that the meaning of these phrases has been sometimes misunderstood.[5] The distinction between unavoidable or inevitable accidents—the terms being synonymous,[6] — and the act of God, is best expressed in a Georgia case:[7] "The latter covers only natural accidents, such as lightning, tempests, earthquakes, and the like, and not accidents arising from the negligence or *act of man*. To make out the case of an exemption for a carrier against either the act of God or unavoidable accident there must be a *vis major:* the interfering cause must be irresistible." In this case, the loss of a bag of cotton through the breaking of an iron chain on the boat, was held not an "unavoidable accident,"

1 South. Ex. Co. *v.* Crook, 44 Ala. 468.
2 Western R. Co. *v.* Little, 5 South. Rep. 568; Draper *v.* Delaware etc. Canal Co., 23 N. E. Rep. 131.
3 Robinson *v.* Merchants' Desp. Co., 45 Ia. 470; Stewart *v.* Merchants' Desp. Co. 47 Ia. 229.
4 Menzell *v.* R. Co., 1 Dill. 531.
5 *Ante*, § 121.
6 Fowler *v.* Davenport, 21 Tex. 626.
7 Central Line *v.* Lowe, 50 Ga. 509.

even though it appeared that the chain had been lately examined and then appeared sound; that it had previously borne heavier weights, and that the breaking was the result of a hidden flaw.[1]

§ 199. **"Value or Cost."**—Where it is provided that the "value or cost" of the property at the place of shipment, shall be the measure of damages, the shipper is entitled to recover its value, though that be greater than its cost.[2]

[1] "It seems absurd to say," said the Court, "that it was not possible to have avoided the breaking of this chain or rod. It ought to have been made stronger; it ought to have been tested. The case is one of simple failure to have a good vessel. This was doubtless an accident, and were that the only word used in the agreement the carrier would be excused; but the words are far stronger than this."

[2] Mo. Pac. R. Co. *v.* Barnes, 2 Tex. App. Cas. 579.

CHAPTER XIII.

THE DUTY TO RE-DELIVER.

SECTION 200. Introductory.
201. Delivery at Proper Place.
202. Delivery in Reasonable Manner.
203. Delivery at Proper Time.
204. Delivery Within Reasonable Time.
205. Delivery under Special Contract—Instructions of Shipper.
206. Delivery to Wrong Person.
207. Duty of Carrier to Notify Consignor.
208. Right to Examine Goods.
209. Claims of Ownership by Third Parties.
210. Stoppage in Transitu.
211. Who may Sue for Loss or Injury to Goods.
212. Actions for Injury to or Interference with Goods.
213. Actions for Freight Charges.
214. Power to Sell.
215. The Carrier's Lien.

§ 200. **Introductory.**—Manifestly, it is the duty of the carrier not only to carry, but to deliver at the destination; and his responsibility continues until that has been done,[1] unless the owner has assumed control before the goods have reached there.[2] The delivery must be complete, and if they are injured or destroyed while the carrier is transferring them from his vehicle to the place of delivery, he is liable.[3] Thus, where goods had been discharged from the barge of a North

[1] Eagle *v.* White, 6 Whart. 505; 37 Am. Dec. 434; Farmers' etc. Bank *v.* Champlain Trans. Co., 16 Vt. 52; 42 Am. Dec. 491; 23 Vt. 186; 56 Am. Dec. 68; Nettles *v.* R. Co., 7 Rich. 190; 62 Am. Dec. 409; Michigan etc. R. Co. *v.* Day, 20 Ill. 375; 71 Am. Dec. 278; Marshall *v.* Am. Ex. Co., 7 Wis. 1; 73 Am. Dec. 381; Gibson *v.* Culver, 17 Wend. 305; 31 Am. Dec. 297; Stone *v.* Waitt, 31 Me. 409; 52 Am. Dec. 621; Lamb *v.* R. Co., 2 Daly 454; Schenk *v.* Propeller Co. 60 Pa. St. 109; 100 Am. Dec. 541.

[2] Stone *v.* Waitt, 31 Me. 409: Bennett *v.* Byram, 38 Miss. 17; 75 Am. Dec. 90.

[3] Knowles *v.* Dabney, 105 Mass. 437.

River carrier to his "float" in the Albany basin, and notice repeatedly given to the forwarders to whom they were directed to take them, when they were destroyed by fire, it was held, that the transfer to the float was not a delivery, but merely preparatory to delivery, and that the carrier was responsible for the loss.[1] The delivery must be actual and *bona fide*, and not merely formal; and therefore, if an agent of the carrier abstract the package while in the act of delivering it, the carrier will be liable, even though a receipt be signed, and the form of delivery gone through by the agent's laying the package for a moment out of his hands.[2]

There are four requisites to the exoneration of the carrier from further responsibility in connection with the goods by his making delivery of them, and these are that it must be made (a) At a proper place; (b) In a reasonable manner; (c) At a proper time; and (d) Within a reasonable time.

§ 201. **Delivery at Proper Place.**—The failure of a common carrier to deliver the goods at the proper place of delivery renders the carrier liable for any loss or injury to them caused thereby.[3] Formerly, when goods were transported by land, with teams, it was held to be the duty of carriers, unless a contrary usage had been established, to deliver freight to the consignee personally at his residence or place of business, according to the circumstances;[4] and such is still the

1 Goold *v.* Chapin, 20 N. Y. 259; 75 Am. Dec. 398.

2 Am. Ex. Co. *v.* Haggard, 37 Ill. 465; 87 Am. Dec. 257.

3 Benbow *v.* R. Co., Phill. 420; 98 Am. Dec. 76; The Sultana *v.* Chapman, 5 Wis. 454; see Arnold *v.* Nat. S. S. Co., 29 Fed. Rep. 184.

4 Lawson Rights. Rem. & Pr. § 1826, Hutch. Carr. 341; Storr *v.* Crowley, 1 Mc. & Y. 129; Fish *v.* Newton, 1 Duer. 45; 43 Am. Dec. 649; Gibson *v.* Culver, 17 Wend. 305; 31 Am. Dec. 297; Hemphill *v.* Chenie, 6 W. & S. 62.

rule as to that class of carriers[1] and express companies.[2] But the carrier may show an established usage to deliver at a certain place, in which case he is discharged from his liability as a common carrier by a delivery at such place.[3]

But in reference to vessels[4] and railroads,[5] a different rule is held, and (unless there is an established usage of a different kind[6]), they are only bound to de-

[1] Bansemer *v.* R. Co., 25 Ind. 434; 87 Am. Dec. 367; Eagle *v.* White, 6 Whart. 505; Gibson *v.* Culver, *supra.*

[2] "For this modern species of carriage was established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail." Witbeck *v.* Holland, 45 N. Y. 13; 6 Am. Rep. 23; 55 Barb. 443; Am. Express Co., *v.* Robinson, 72 Pa. St. 274; Am. Ex. Co. *v.* Hackett, 39 Ind. 250; 95 Am. Dec. 691; Baldwin *v.* Am. Ex. Co., 23 Ill. 202; 74 Am. Dec. 191; Chicago etc. R. Co. *v.* Sawyer, 69 Ill. 289; 18 Am. Rep. 613; Am. Ex. Co. *v.* Wolf, 79 Ill. 432; Am. Ex. Co. *v.* Baldwin, 26 Ill. 504; 79 Am. Dec. 389; South. Ex. *v.* Armistead, 50 Ala. 350; Am. Ex. Co., *v.* Schier, 55 Ill. 140; Marshall *v.* Am. Ex. Co., 7 Wis. 1; Haslam *v.* Adams Ex. Co., 6 Bosw. 235.

[3] Lawson Us. & Cust., 96; Marshall *v.* Am. Ex. Co., 7 Wis. 1; 73 Am. Dec. 381; South. Ex. Co. *v.* Everett, 27 Ga. 688; Kohn *v.* Packard, 3 La. 224; 23 Am. Dec. 453; Sullivan *v.* Thompson, 99 Mass. 257; Weed *v.* Barney, 45 N. Y. 344; 6 Am. Rep. 96; Am. Ex. Co. *v.* Robinson, 72 Pa. St. 274; Baldwin *v.* Am. Ex. Co., 74; Am. Dec. 791; Maheim *v.* Carr, 62 Me. 473. The rule as to personal delivery by express companies may be changed by the usage of the carrier at places where the amount of business done does not justify the employment of delivery wagons. Baldwin *v.* Am. Ex. Co., *supra*; Am. Ex. Co. *v.* Schier, *supra*; Haslam *v.* Adams Ex. Co., 6 Bosw. 288; Gulliver *v.* Adams Ex. Co., 38 Ill. 503; Sullivan *v.* Thompson, 99 Mass. 259; Packard *v.* Earle, 113 Mass. 280.

[4] De Mott *v.* Laraway, 14 Wend. 225; 28 Am. Dec. 523; Solomon *v.* Steam Co., 2 Daly 104; Ostrander *v.* Brown, 15 Johns. 39; 8 Am. Dec. 211; Kohn *v.* Packard, 3 La. 224; 23 Am. Dec. 453; Young *v.* Smith, 3 Dana, 91; 28 Am. Dec. 57; McAndrew *v.* Whitlock, 52 N. Y. 40; 11 Am. Rep. 657; Dean *v.* Vaccaro, 2 Head. 488; 75 Am. Dec. 744; The Peytona, 2 Curtis 21; Scholes *v.* Ackerland, 15 Ill. 474; Barclay *v.* Clide, 2 E. D. Smith, 95; Hermann *v.* Goodrich, 21 Wis. 543; 94 Am. Dec. 562; Redmond *v.* Steam Co., 56 Barb. 320; Dibble *v.* Morgan, 1 Woods, 406; Bansemer *v.* R. Co., 25 Ind. 434; 87 Am. Dec. 367; Morgan *v.* Dibble, 29 Tex. 107; 94 Am. Dec. 264; Shenk *v.* Propeller Co., 60 Pa. St. 109; 100 Am. Dec. 541.

[5] Goodwin *v.* R. Co., 50 N. Y. 154; 10 Am. Rep. 457; Thomas *v.* R. Co., 10 Met. 972; 43 Am. Dec. 444; Norway Plains Co. *v.* R. Co., 1 Gray, 263; 61 Am. Dec. 423; Zinn *v.* Steam Co., 49 N. Y. 442; 10 Am. Rep. 402; Hill Mfg. Co. *v.* R. Co., 104 Mass. 122; 6 Am. Rep. 202; Leavenworth R. Co. *v.* Maris, 16 Kan. 333; Chicago etc. R. Co. *v.* Bensley, 69 Ill. 639; Western etc. R. Co. *v.* Camp, 53 Ga. 596; Cahn *v.* R. Co., 71 Ill. 96; Dresbach *v.* R. Co., 57 Cal. 462; Morris etc. R. Co. *v.* Ayres, 24 N. J. L. 393; 80 Am. Dec. 215; Wood *v.* Crocker, 18 Wis. 345; 86 Am. Dec. 773; Bansemer *v.* R. Co., 25 Ind. 434; 87 Am. Dec. 367; Blumenthal *v.* Brainerd, 38 Vt. 402; 91 Am. Dec. 349; Francis *v.* R. Co., 25 Iowa, 60; 95 Am. Dec. 769; McMillan *v.* R. Co., 16 Mich. 79; 93 Am. Dec. 208; Shenk *v.* Steam Propeller Co., 60 Pa. St. 109; 100 Am. Dec 541; Tarbell *v.* Royal Ex. Co., 110 N. Y. 170; 6 Am. St. Rep. 350; 17 N. E. Rep. 721.

[6] Turner *v.* Huff, 46 Ark. 222; 55 Am. Rep. 580.

liver at their wharves or warehouses at the place of destination, and, after having given the consignee notice of their arrival, and the lapse of a reasonable time for the consignee to take them away, their liability as common carriers, ceases, and they are only liable as warehousemen for the goods.[1] It is as much a part of the contract of shipment that the owner or consignee of freight shall be ready at the place of destination to receive the goods, upon reasonable notice of their arrival, as that the carrier shall transport them. And the fact that the consignee's business address was stated in the bill of lading does not oblige the carrier to depart from his known and usual place of delivery.[2]

Though the carrier, where he has no warehouse at the place, and is accustomed to make delivery by placing the cars on the side track, may terminate his insurance liability in this way;[3] yet his liability does not cease until the cars have been so placed that they can be unloaded with a reasonable degree of convenience.[4]

§ 202. **Delivery in Reasonable Manner.**—Where personal delivery is not required, the carrier must give

[1] *i.e.* liable for negligence in keeping or storing them. Rowland *v.* Miln, 3 Holt, 150; Redmond *v.* Liverpool etc. Steam Co., 46 N. Y. 578; 7 Am. Rep. 390; Smith *v.* R. Co., 27 N. H. 86; 59 Am. Dec. 364; Norway Plains Co. *v.* R. Co., 1 Gray, 263; 61 Am. Dec. 423; Northrup *v.* R. Co., 5 Abb. Pr. N. S. 425; Kremer *v.* Ex. Co., 6 Cold. 356; Hirsch *v.* Quaker City, 2 Disn. 144; Fenner *v.* R. Co., 44 N. Y. 505; 4 Am. Rep. 709; Derosia *v.* R. Co., 18 Minn. 133; Rice *v.* Hart, 118 Mass. 201; 19 Am. Rep. 433; Am. Ex. Co. *v.* Wolfe, 79 Ill. 430; The Bobolink, 6 Saw. 146; Chalk *v.* R. Co., 85 N. C. 423; Hirschfield *v.* R. Co., 56 Cal. 484; Kennedy *v.* R. Co., 74 Ala. 430; Blumenthal *v.* Brainerd, 38 Vt. 402; 91 Am. Dec. 349; Adams Ex. Co. *v.* Darnell, 31 Ind. 20; 99 Am. Dec. 582; Fenner *v.* R. Co., 44 N. Y. 505; 4 Am. Rep. 769; Knowles *v.* R. Co., 38 Me. 55; 61 Am. Dec. 234; Mobile etc. R. Co. *v.* Prewett, 46 Ala. 63; 7 Am. Rep. 586; Weed *v.* Borney, 45 N. Y. 344; 6 Am. Rep. 96. The carrier must provide convenient and reasonable places in which to store his freight. Whitney *v.* R. Co., 27 Wis. 327; Thomas *v.* R. Co., 10 Metc. 472; 43 Am. Dec. 444. And he must keep the goods in store for the consignee a reasonable time without additional reward. Bansemer *v.* R. Co., 25 Ind. 434; 87 Am. Dec. 367.

[2] West. Trans. Co. *v.* Hawley, 1 Daly, 227.

[3] South. etc. R. Co. *v.* Wood, 66 Ala. 167; 41 Am. Rep. 749; 71 Ala. 215; 46 Am. Rep. 309.

[4] Independence Mills Co. *v.* R. Co., 72 Ia. 535; 34 N. W. Rep. 320.

the owner due notice of the arrival of the goods, in order to discharge himself from further liability.[1] He cannot get rid of his insurance liability without such notice, and the expiration of a reasonable time there-

1 See cases cited, § 195. But the carrier should have received from the consignor or consignee information as to the residence of the consignee or should have means of finding it out. Pelton *v.* Co., 54 N. Y. 214; 13 Am. Rep. 568; Fish *v.* Newton, 1 Duer, 45; 43 Am. Dec. 649. Where the letter containing the notice was insufficiently directed by the carrier and was not received by the consignee, and the goods in the meanwhile were destroyed the carrier was held not discharged. Union Steam. Co. *v.* Knapp, 73 Ill. 506. So where the carrier's servant erroneously informed the consignee that they had not arrived. Jeffersonville etc. R. Co. *v.* Cotton, 29 Ind. 498; 95 Am. Dec. 656; McKinney *v.* Jenett, 90 N. Y. 267; Meyer *v.* R. Co., 24 Wis. 566. In the case of railroad transportation there is a great difference of opinion as to the obligation of the carrier to give notice. The rule in Massachusetts is that it is not necessary; but that the liability of the railroad as a common carrier ends when the goods reach their destination and are deposited in a proper place ready for the consignee to call for them. Norway Plains Co. *v.* R. Co., 1 Gray 263; Stowe *v.* R. Co., 100 Mass. 455. And the Massachusetts rule is said by Mr. Hutchinson (Carr. 370), to be followed in *Alabama*, citing Ala. etc. R. Co. *v.* Kidd, 35 Ala. 209; Mobile etc. R. Co. *v.* Prewitt, 46 Ala. 63. *California.*—Jackson *v.* R. Co., 23 Cal. 268. *Georgia.*—Southwestern R. Co. *v.* Felder, 46 Ga. 433. *Illinois.*—Porter *v.* R. C., 20 Ill. 407; 71 Am. Dec. 286; Chicago etc. R. Co. *v.* Scott, 42 Ill. 132; and see Chicago etc. R. Co. *v.* Pratt, 13 Ill. (App.) 447. *Indiana.*—Bansemer *v.* R. Co., 25 Ind. 434; 87 Am. Dec. 367; Chicago etc. R. Co. *v.* McCool, 26 Ind. 140. *Iowa*—Mohr *v.* R. Co., 40 Ia. 579; Francis *v.* R. Co., 25 Ia. 60. *North Carolina.*—Neal *v.* R. Co., 8 Jones (L.) 482. *Pennsylvania.*—McCarthy *v.* R. Co., 30 Pa. St. 247. In New Hampshire though no notice is required the consignee must be given a reasonable time to remove the goods. Moses *v.* R. Co., 32 N. H. 623; 64 Am. Dec. 381, and this rule is followed. (Hutch Carr. 370); in *Kansas*, Leavenworth etc. R. Co. *v.* Maris, 16 Kas. 333. *Kentucky.*—Jeffersonville etc. R. Co. *v.* Cleveland, 2 Bush. 468, *Louisiana.*—Maignan *v.* R. Co., 24 La. Ann. 333. *New Jersey.*—Morris etc. R. Co. *v.* Ayres, 5 Dutch. 303. *Ohio.*—Hirsch *v.* The Quaker City, 2 Disney 144. *Vermont.*—Blumenthal *v.* Brainerd, 38 Vt. 402; Ouimet *v.* Henshaw, 35 Vt. 604; Winslow *v.* R. Co., 42 Id. 700. *Wisconsin.*—Lemke *v.* R. Co., 39 Wis. 449; Wood *v.* Crocker, 18 Wis. 363. In New York the rule is "that if the consignee is present, upon the arrival of the goods, he must take them without unreasonable delay; if he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he must have a reasonable time to remove them; if he is absent, unknown or cannot be found, the carrier may store them; and if, after notice of the arrival of the goods, the consignee has had a reasonable opportunity to remove them, and does not, he cannot hold the carrier longer as an insurer." Hutch. Carr., § 374, citing, Fenner *v.* R. Co., 44 N. Y. 505; Hedges *v.* R. C., 49 Id. 223; McDonald *v.* R. Co., 34 Id. 497; Sprague *v.* R. Co., 52 Id. 637; Pelton *v.* R. Co., 54 Id. 214, and this rule says the same authority (§ 374) is followed in *Michigan* —Buckley *v.* R. Co., 18 Mich. 121; McMillan *v.* R. Co., 16 Mich. 79. *Minnesota.*—Pinney *v.* R. Co., 19 Minn. 251; Derosia *v.* R. Co., 18 Minn. 133; see Kirk *v.* R. Co., 60 N. W. Rep. 1084 (Minn). And this is the English rule also. Browne Carr. (Cap. VIII). The New Hampshire rule is followed in Missouri. Eaton *v.* R. Co., 12 Mo. (App.) 386; Rankin *v.* R. Co., 55 Mo. 167. See Gashweiler *v.* R. Co., 83 Mo. 112; 6 Am. Rep. 152. In a late case in Arkansas

after in which to enable the consignee to come and get the goods.[1] A "reasonable time" is such as would enable one residing in the vicinity of the place of delivery, and informed of the probable time of arrival, to inspect and remove the goods during business hours.[2]

§ 203. **Delivery at Proper Time.**—Where personal delivery is required, it must be made at a reasonable hour, *i. e.*, in the case of a consignee who is engaged in business within business hours, and so where the consignee is notified to come and get the goods, he must be given the opportunity during ordinary working hours.[3] Goods cannot be landed and the consignee required to accept them or take them away on Sunday or upon any legal holiday on which labor is forbidden.[4]

after a critical review of the authorities, the Supreme Court, say: (Missouri Pac. R. Co. *v.* Nevill 30 S. W. Rep. 425): "Counsel for appellant cite Alabama and Pennsylvania as supporting the Massachusetts rule, but an examination of the cases of Railroad Co. *v.* McGuire, 79 Ala. 395, and Railroad Co. *v.* Oden, 80 Ala. 39, and the case of Steamship Co. *v.* Smart, 107 Pa. St. 492, will discover that Alabama and Pennsylvania are in line with the New Hampshire rule as to the consignee having a reasonable time in which to remove the goods, during which time the liability of the carrier as an insurer continues. Counsel for appellee are likewise mistaken in putting Tennessee in the New Hampshire column. See Butler *v.* Railroad Co., 8 Lea 32. But, whatever rule we adopt, we will be but going upon a well-beaten path, and following in the footsteps of eminent jurists. It is difficult to determine where lies the weight of authority amid such respectable conflict. But, considering the broad principles of public policy and convenience upon which the common-law liability of the carrier is made to rest, the doctrine of the New Hampshire court commends itself to our favor. We think it embodies the better reason. Without entering upon a discussion of these principles (for we could not hope to add anything new) we simply announce our approval of the New Hampshire case as applicable to the undisputed facts of this case. This doctrine is supported, we believe, by a majority of the text writers, as well as the adjudicated cases."

1 Faulkner *v.* Hart, 82 N. Y. 413; 37 Am. Rep. 574; Mills *v.* R. Co., 45 N.Y. 622; 6 Am. Rep. 152; Bell *v.* R. Co., 6 Mo. (App.) 363; Redmond *v.* Liverpool etc. Steam Co., 46 N. Y. 578; 7 Am. Rep. 390; Winslow *v.* R. Co., 27 Vt. 700; 1 Am. Rep. 365; Graves *v.* Hartford Steam Co., 38 Conn. 143; 9 Am. Rep. 369.

2 Bell *v.* R. Co., 6 Mo. (App.) 363; Leavenworth etc. R. Co. *v.* Maris, 16 Kas. 333; Wood *v.* Crocker, 18 Wis. 345; 86 Am. Dec. 773. Louisville, etc., R. Co. *v.* McGuire, 79 Ala. 395; Rice *v.* Hart, 118 Mass. 201; 19 Am. Rep. 433.

3 Browne Carr., § 286.

4 Hutch. Carr., § 362, citing Richardson *v.* Goddard, 23 How. 28; Russell Manfg. Co. *v.* Steam Co., 50 N. Y. 121.

§ 204. **Delivery within Reasonable Time.**—The place is not only a matter of importance, but the time is an element of the contract. Goods are not intrusted to a carrier that he may deliver them at his own good pleasure, but that he may deliver them in such time as, looking at the length of his ordinary journey, the mode of the conveyance, and the circumstances of which the owner might be cognizant[1] before he intrusted his goods, shall be deemed reasonable;[2] for a carrier is bound to know when he accepts property for shipment, that he has or can obtain facilities for its transportation within a reasonable time.[3] The question as to what is to be considered a reasonable time must be looked at in relation to all other circumstances of the case—the weather,[4] the state of the roads,[5] the season of the year, and other matters of a like sort. It is generally held that delay in delivery is excused by the violence and intimidation of striking employes of the carrier.[6] The carrier is not an insurer in this respect; as to time, he is answerable only for want of due diligence, and may excuse delay by showing accidents that are not inevitable, or produced by the act of God.[7] The carrier is liable for a negligent delay in delivering the goods.[8] It is no defense that the railroad needed its

1 Browne Carr, § 232.

2 Peterson *v.* Case, 21 Fed. Rep. 885.

3 Thomas *v.* R. Co., 63 Fed. Rep. 200.

4 A snow storm for example obstructing the road. Pruitt *v.* R. Co., 62 Mo. 527.

5 Browne Carr, § 232. Peet *v.* R. Co., 20 Wis. 594; 91 Am. Dec. 446.

6 Geismer *v.* Lake Shore etc. R. Co., 102 N.Y. 563; 55 Am. Rep. 837; 7 N.E. Rep. 828; Haas *v.* Kas. City R. Co., 7 S. E. Rep. 629 (Ga.); Pitts. etc. R. Co. *v.* Hazen, 84 Ill. 36; 25 Am. Rep. 423; Lake Shore R. Co. *v.* Bernett, 89 Ind. 457; Bartlett *v.* Pittsburgh R. Co., 94 Ind. 281; Little *v.* Fargo, 43 Hun. 233; Int. etc. R. Co. *v.* Tisdale, 11 S. W. Rep. 900; Ind. etc. R. Co. *v.* Juntgen, 10 Ill. (App.) 295; Pitts. etc. R. Co. *v.* Hollowell, 65 Ind. 188; Pitts. etc. R. Co. *v.* Hollenback, 65 Ind. 188; 32 Am. Rep. 63.

7 Parsons *v.* Hardy, 14 Wend. 215; 28 Am. Dec. 521; Strohn *v.* R. Co., 23 Wis. 126; 99 Am. Dec, 114; Empire Trans. Co. *v.* Wallace, 68 Pa. St. 302; 8 Am. Rep. 178.

8 Rathbone *v.* Neal, 4 La. Ann. 563; 50 Am. Dec. 579; Michigan etc. R. Co. *v.* Day, 20 Ill. 375; 71 Am. Dec. 278; Bennett *v.* Byram, 38 Miss. 17; 75 Am. Dec. 90; Rawson *v.* Holland, 59 N. Y. 611. A

rolling stock for the purpose of conveying passengers,[1] or that the delay was caused by the lack of proper appliances for transportation;[2] or on the ground of an unexpected press of business;[3] or that a bridge on its line broke down, so that it was forced to send the goods by another route.[4]

Where a carrier omits, for an unreasonable time to deliver property intrusted to him for transportation, and then offers to deliver it, the owner cannot refuse to receive it, and proceed against the carrier for its conversion, though the latter is liable for damages for the delay.[5]

§ 205. **Delivery under Special Contract.—Instructions of Shipper.**—The carrier, if the mode of delivery has been made a matter of special contract, must deliver in the way prescribed, and must likewise follow the instructions of the shipper concerning the delivery.[6] If the goods are sent C. O. D., *i. e.*, not to be delivered until paid for, and the carrier delivers them without receiving the money, he assumes the responsibility that the price will be paid.[7] He is also obliged to give the consignee a reasonable time in which to obtain the money, and must not at once, after they are tendered, and the money not ready, return them to

delay of seventy-four days beyond the usual time of delivering freight has been held negligent. St. Louis etc. R. Co *v.* Heath, 41 Ark. 476. So a delay of twenty-four hours at a way station. Ormsby *v.* R. Co., 2 McCrary 48. So a delay of twelve days. Michigan etc. R. Co. *v.* Day, 20 Ill. 375; 71 Am. Dec. 278. A delay of four days. St. Clair *v.* R. Co., 45 N. W. Rep. 570.

1 Ormsby *v.* R Co., 2 McCrary 48.

2 Tucker *v.* R Co., 50 Mo. 385.

3 Marine Ins. Co. *v.* R. Co., 41 Fed. Rep. 643.

4 Guinn *v.* R. Co., 20 Mo. App. 453.

5 Scovill *v.* Griffith, 12 N. Y. 509.

6 Michigan etc. R. Co. *v.* Day, 20 Ill. 375; 71 Am. Dec. 278; The Chronicle, 29 Fed. Rep. 521; Strahorn *v.* Union Stock Yard Co., 43 Ill. 424; 82 Am. Dec. 142; Wright *v.* R. Co., 8 Phila. 19; McEwan *v.* R. Co., 33 Ind. 368; 5 Am. Rep. 216; Houston etc. R. Co. *v.* Adams, 49 Tex. 78; 30 Am. Rep. 117.

7 Tooker *v.* Gorman, 2 Hilb. 71; Am. Ex. Co. *v.* Haire, 21 Ind. 4; 83 Am. Dec. 334; Am. Ex. Co. v. Lessem, 39 Ill. 312; Murray v. Warner, 55 N. H. 546; Union etc. R. Co. v. Riegel, 73 Pa. St. 72.

the consignor.[1] On general principles the carrier being the shipper's agent, must follow his directions in all things, and if he has made a special contract, he must perform the contract strictly, according to its terms. The rule is, that if he attempt to perform his contract in a manner different from his express undertaking, he becomes an insurer for the absolute delivery of the goods and can not avail himself of any exceptions made in his behalf in the contract.[2]

Where the carrier has agreed to carry the goods to their destination within a fixed time, he must perform his contract, and no obstruction of any kind, or even impossibility, will excuse him.[3] This is only a particular application of the general law of contracts.[4] The contract may be implied as well as express, as where the carrier accepts goods, knowing that they are intended to be at the place of destination on a given day.[5]

The owner may change his mind with regard to the destination of the goods. As it was he who gave them a destination in the hands of the carrier, he may, if he chooses, countermand his first order. Such a countermand will, of course, justify a non-delivery upon the part of the carrier, and may be given at any time during the transit.[6]

1 Great West. R. Co. *v.* Crouch, 3 H. & N. 183.

2 Merrick *v.* Webster, 3 Mich. 268; Maghee v. R. Co., 45 N. Y. 514; Bostwick *v.* R. Co., 45 N. Y. 712; Dunseth *v.* Wade, 73 Ill. 285; Goddard *v.* Mallory, 52 Barb. 19; Bazin *v.* Steamship Co., 3 Wall, Pr. 22; Crosby *v.* Fitch, 12 Conn. 410; Read *v.* Spaulding, 5 Bosw. 395; 30 N. Y. 630; Hand *v.* Baynes, 4 Whart. 204; Cassilay *v.* Young, 4 B. Mon. 265; Stewart *v.* Merch. Disp. Trans. Co., 47 Iowa, 269; Robinson *v.* Merch. Disp. Trans. Co., 45 Iowa, 470; Fatman *v.* R. Co., 2 Disney, 248; Goodrich *v.* Thompson, 4 Rob. 75; 44 N. Y. 324; Johnson *v.* R. Co., 31 Barb. 196; 33 N. Y. 610.

3 Place *v.* Union Exp. Co., 2 Hilt. 19; Deming *v.* R. Co., 48 N. H. 455; 2 Am. Rep. 267; Parmlee *v.* Wilks, 22 Barb. 539; Harmony *v.* Bingham, 12 N. Y. 99; 62 Am. Dec. 142.

4 See Lawson Cont. § 420.

5 Phila. etc. R. Co., *v.* Lehman. 56 Ind. 209; Grindle *v.* Express Co., 67 Me. 317; 24 Am. Rep. 31; Chicago etc. R. Co. *v.* Thrapp, 5 Ill. (App.) 502; See United States Ex. Co. *v.* Root, 47 Mich. 231;

6 Browne, Carr. § 267. The same is true also of the consignee. London etc. R. Co. *v.* Bartlett, 7 H. & N. 400.

§ 206. **Delivery to Wrong Person.**—The duty of the carrier is imperatively to deliver to the right person, and no amount of care will excuse him from delivering to a person other than the right one.[1] But it has been held that where a carrier delivers goods according to their address, he is not responsible for the fact that the person to whom they are addressed represented himself to the seller to be another person of the same name, and that the seller is swindled out of his goods.[2]

§ 207. **Duty of Carrier to Notify Consignor.**—Where the consignee has refused to take the goods, or cannot be found, it seems that the carrier's duty is at an end after he stores them to be called for, and that he is not bound to notify the consignor, unless the case was one which required personal delivery or the giving of notice of arrival; and even then he is not

1 Howard *v.* Steam Co., 83 N. C. 158; 35 Am. Rep. 571; Ela *v.* Express Co., 29 Wis. 611; 9 Am. Rep. 619; Adams *v.* Blankenstein, 2 Cal. 413; 56 Am. Dec. 350; South. Ex. Co. *v.* Crook, 44 Ala. 468; 4 Am. Rep. 140; McEntee *v.* N. J. Steam Co., 45 N. Y. 34; 6 Am. Rep. 28; The Huntress, Davies, 82; Am. Ex. Co. *v.* Stack, 29 Ind. 27; Am. Ex. Co. *v.* Milk, 73 Ill. 224; Little Rock etc. R. Co. *v.* Glidewell, 39 Ark. 487; Hayes *v.* Wells. 23 Cal. 185; 83 Am. Dec. 89; Shenk *v.* Propeller Co., 60 Pa. St. 109; 100 Am. Dec 541; Penn. R. Co. *v.* Stern, 119 Pa. St. 24; Price *v.* R. Co., 50 N. Y. 213; 10 Am. Rep. 475; Stephenson *v.* Hart, 4 Bing. 476; Sanquer v. R. Co., 16 C. B. 163; Wernwag *v.* R. Co., 117 Pa. St. 46; Furman *v.* R. Co., 106 N. Y. 579; Claflin *v.* R. Co., 7 Allen, 41; McCullough *v.* McDonald, 91 Ind. 29; Merchants Dis. Co. *v.* Merriam, 111 Ind. 5; 11 N. E. Rep. 954; Guillaume *v.* Hamburg etc. Packet Co., 42 N. Y. 212; 1 Am. Rep. 512; Viner *v.* Steam Co., 50 N. Y. 23; South. Ex. Co. *v.* Van Meter, 17 Fla. 783; 35 Am. Rep. 107; McEwan *v.* R. Co., 33 Ind. 368; 5 Am. Rep. 216. "Common carriers deliver property at their peril, and must take care that it is delivered to the right person; for if the delivery be to the wrong person, either by an innocent mistake or through fraud of third persons, as upon a forged order, they will be responsible, and the wrongful delivery will be treated as a conversion." McEntee v. N. J. Steam Co. *supra.* Loss of goods by a wrong delivery, is a conversion for which the carrier is liable to account at the full value of the goods, this mode of loss not being within the terms of the special contract fixing a conventional value upon the goods at the time of shipment in consideration of the rate of freight being reduced. Savannah etc. R. Co. *v.* Sloat, 20 S. C. Rep. 219 (Ga.).

2 The Drew, 15 Fed. Rep. 826; Wilson *v.* Adams Ex. Co., 27 Mo. (App.) 360; Samuel *v.* Cheney, 135 Mass. 278; 46 Am. Rep. 467; Dunbar *v.* R. Co., 110 Mass. 26; 14 Am. Rep. 576. But see Winslow *v.* R. Co., 42 Vt. 700; 1 Am. Rep. 365.

under any obligation to notify the consignor, unless he has been informed, or has reason to believe that the goods are the property of the consignor. The carrier has always the right to presume that the goods belong to the consignee unless he is otherwise informed, or is bound to infer otherwise from the circumstances.[1]

§ 208. **Right to Examine Goods.**—The carrier should give the consignee the opportunity of examining the goods before he accepts them.[2] Mr. Browne, in summing up the rules as to delivery by the carrier, says: "The liability of a carrier as such, continues until the goods are ready to be delivered at their place of destination, and the consignee has had a reasonable opportunity, during the hours when such goods are usually delivered, in which to examine them so far as to judge of their outward appearance, and to remove them."[3]

§ 209. **Claims of Ownership by Third Party.**—Where the goods, while still in the hands of the carrier, are claimed by some one not the bailor who asserts his ownership, and the carrier, under such circumstances, delivers the goods to their actual owner, will that terminate his liability to the bailor, which, under ordinary circumstances, is only discharged by delivery to the consignee? This question has been much discussed and different opinions have been expressed. The better view seems to be that while a carrier can-

1 Hutch. Carr., §§ 387, 388; Sweet *v.* Barney, 23 N. Y. 335; Weed *v.* Barney, 45 N. Y. 344; 6 Am. Rep. 79; Merchant's etc. Trans. Co. *v.* Hallock, 64 Ill. 284; Williams *v.* Holland, 22 How. Pr. 137; Bingham *v.* Lamping, 26 Pa. St. 340; 67 Am. Dec. 418.

2 Hutch., Carr., § 393; Lyon *v.* Hill, 46 N.Y. 49; 88 Am. Dec. 189; Herrick *v.* Gallagher, 60 Barb. 566.

3 Browne, Carr., § 233.

not, any more than an ordinary bailee, dispute his bailor's title, this should be restricted to cases where the adverse claim is not asserted by the real owner, but is asserted by the carrier, of his own mere motion,[1] but that where the adverse title is asserted by another, and the carrier forbidden to deliver them by him, he may set up this title against the bailor.[2] Where a carrier has received goods from a wrongful owner, and has delivered them to the consignee before he is made aware that the bailor was not the rightful owner, he cannot, of course, be held liable to the latter. Nor does he, by mere actual or constructive knowledge of the right of a third party, thereby become a trustee for that third party, as against the consignee; and even under such circumstances, and with such information, he will not be liable if he delivers the goods to the consignee, unless he does so under circumstances of fraud.[3] The carrier holds for his employer, and if a third party sets up a claim, he will admit it and deliver the goods to him at his peril. The proper course

1 "No matter how tortious or fraudulent may have been the means by which the bailor acquired possession of the property, nor how entirely destitute of all right to it as against the true owner, the bailee cannot legally withhold it from him unless the owner has set up his claim and the bailee has yielded to it; and if the carrier or other bailee, whilst still holding possession of the property, would defend against the claim of his bailor by setting up the paramount title of another, he must at least show that it is done by his authority and on his behalf. Otherwise the bailee might avail himself of the title of a third person which might never be asserted by such person, and thus be enabled to keep the property for himself without a shadow of title, when by his contract he had undertaken to return it to the bailor or to deliver it according to his directions. But so soon as he has restored it to the person to whom it belongs, or has agreed, upon his demand, to hold it for him, the estoppel ceases, because the original bailment has come to an end by that which is equivalent to an eviction by title paramount." Hutch. Carr., § 405.

2 Sheridan *v.* New Quay Co., 4 C. B. (N. S.) 618; Hutch. Carr. § 405, citing The Idaho, 93 U. S. 575; 11 Blatch. 218; Rosenfield *v.* Express Co., 1 Woods 131; West. Trans. Co. *v.* Barber, 56 N. Y. 544; Lowremore *v.* Berry, 19 Ala. 130; Harker *v.* Dement, 9 Gill 7; Floyd *v.* Bovard, 6 Watts & S. 75; King *v.* Richards, 6 Whart. 418; Bates *v.* Stanton, 1 Duer. 79. The contrary opinion in Story Bail., § 582, is criticised in the English case cited above.

3 Browne Carr. § 276.

is for the carrier to file a bill of interpleader to judicially ascertain who is the true owner;[1] or he may deliver them to the one who appears to him to have the title upon being indemnified by him against loss in case he should be mistaken.[2]

The carrier must give prompt notice to the consignor or owner of the goods, if known, of such seizure, or of the institution of legal proceedings against the goods, in order that he may have the opportunity of showing his title to the goods, or of protecting his interest in them[3]

And the carrier may refuse to deliver until the person making demand for the goods produces evidence of his authority, or identifies himself as the consignee.[4] But his refusal on this account must be in good faith and he must not detain them an unreasonable time on this pretext, and what is a reasonable time is a question for the jury.[5]

§ 210. **Stoppage in Transitu.**—The exercise of the right of *stoppage in transitu* affords a justification for non-delivery. This right is that which is vested in an unpaid vendor of goods,[6] to stop them while they are on their way to the vendee, and before they have actually come into his possession. This is done by the vendor or consignor giving notice to the carrier to hold the goods, and as the carrier is obliged to obey

1 Wilson *v.* Anderton, 1 B. & Ad. 450.

2 Hutch Carr, § 407.

3 Hutch Carr. citing Ohio etc. R. Co. *v.* Yohe, 51 Ind. 181; 19 Am. Rep. 727; Blivin *v.* R. Co., 36 N. Y. 403; 35 Barb. 188; Mierson *v.* Hope, 2 Sweeney, 561.

4 McEntee *v.* Steam Co., 45 N. Y. 34; 6 Am. Rep. 28; Dwyer *v.* R. Co., 69 Tex. 707; 7 S. W. Rep. 504.

5 McEntee *v.* Steam Co., *supra*; Balt. etc. R. Co. *v.* Pumphrey, 59 Md. 390; Hutch. Carr., § 408, citing Solomons *v.* Dawes, 1 Esp. 83; Green *v.* Dunn, 3 Camp. 215; Dunlap *v.* Hunting, 2 Denio, 643; Holbrook *v.* Wight, 24 Wend. 169; Rogers *v.* Weir, 34 N. Y. 463.

6 For certain reasons which are not relevant here, but rather to a text book on the Law of Sales.

this notice,[1] it follows that it is a good defense to any claim upon the carrier by the vendee for non-delivery.

§ 211. **Who may Sue for Loss or Injury to Goods.**—In almost every case there are two parties interested in the safe custody and delivery of the goods by the carrier, *i. e.*, the consignor or the sender, and the consignee or the receiver, and it would, therefore, seem not easy to determine whether the right is in the consignor or consignee to bring the action for loss or damage to the goods while they were in the custody of the carrier. The carrier must be liable to one party or the other; and if the wrong party were to recover against him, he would be liable to be harassed again.[2] Hence, the importance of coming to some definite understanding as to the rights of each; for it has been held that where the property in goods has passed to a consignee, it is no defense to an action by him against the carrier for the loss that the consignor has claimed, and that the carrier has *bona fide* paid him the amount of the loss.[3] The principle of the law of sales, that delivery of the goods to the carrier by the vendor vests the title and ownership *prima facie* in the vendee or consignee, makes the carrier presumptively the agent of the consignee,[4] and therefore, in an action against a carrier for such loss or damage, the

[1] Allen *v.* R. Co., 79 Me. 327; 1 Am. St. Rep. 310; 9 Atl. Rep. 895.

[2] Browne. Carr. § 595.

[3] Browne Carr, § 595 citing Coombs *v.* R. Co., 3 H. & N. 1; 27 L. J. Exch. 269; West. etc. R. Co. *v.* Kelly, 1 Head, 158.

[4] Tied., Sales, § 95, citing Bradford *v.* Marbury, 12 Ala. 520; 46 Am. Dec. 264; Hobart *v.* Littlefield, 13 R. I. 341; Ludlow *v.* Browne, 1 Johns. 115; Dunlop *v.* Lambert, 6 Clark & F. 600; Hunter *v.* Wright, 12 Allen, 548; Garland *v.* Lane, 46 N. H. 245; Thompson *v.* Baltimore etc. R. Co., 28 Md. 396; Burton *v.* Baird, 44 Ark. 556; State *v.* Carl, 43 Ark. 353; Pilgreen *v.* State, 71 Ala. 368; State *v.* O'Neill, 58 Vt. 140; 56 Am. Rep. 557; Sarbecker *v.* State, 65 Wis. 171; 56 Am. Rep. 624; Fragano *v.* Long, 4 Barn. & C. 219; Dawes *v.* Peck, 8 T. R. 330; Johnson *v.* Dodgson, 2 M. & W. 653; Meredith *v.* Meigh, 7 E. & B. 364; 22 L. J.

vendee or consignee is generally the proper plaintiff.[1] And this must be also true where the particular carrier has been selected by the consignee himself, for such carrier has then become his special agent.[2] But as the real test is which of the two, the consignor or consignee, has taken the risk of the goods while in the carrier's hands, it follows that the consignor is the real party in interest:—

1. Where by agreement between consignor and consignee the former assumes the risk until they reach the consignee's hands, as where the consignor undertakes to deliver them at a particular place.[3]

2. Where he (the consignor), has made the contract of carriage with the carrier, though in this case the recovery will be for the benefit of the consignee, if he was the real owner of the goods.[4] This, however, would not be the rule in the Code States where the action is required to be brought by the real party in interest.

3. Consequently, a mere servant or agent with whom a contract is made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon; unless the

Q. B. 401; Hart *v.* Bush, E. B. & E. 494; 27 L. J. Q. B. 271; Smith *v.* Hudson, 6 B. & S. 431; 34 L. J. Q. B. 145; Cusack *v.* Robinson, 1 B. & S. 299; 30 L. J. Q. B. 261; Norman *v.* Phillips, 4 M. & W. 277; Com. *v.* Farnum, 114 Mass. 267; Janney *v.* Sleeper, 30 Minn. 483; Garbracht *v.* Com., 96 Pa. St. 449; 42 Am. Rep. 550; Finch *v.* Mansfield, 97 Mass. 89; Abberger *v.* Martin, 102 Mass. 308; Brockway *v.* Maloney, 102 Mass. 308; Dolan *v.* Green, 110 Mass. 322; Frank *v.* Hoey, 128 Mass. 263; Tegler *v.* Shipman, 33 Iowa, 194; 11 Am. Rep. 118; Shuenfeldt *v.* Junkerman, 20 Fed. Rep. 357; Hill *v.* Spear 50 N. H. 253; 9 Am. Rep. 205; Boothby *v.* Plaisted, 51 N. H. 436; 12 Am. Rep. 140; Ranney *v.* Higby, 4 Wis. 154; Somers *v.* McLaughlin, 57 Wis. 364.

[1] Hutch, Carr., § 731, citing Dawes *v.* Peck, 8 Term. Rep., 330; Blum *v.* The Caddo, 1 Woods, 64; Tindall *v.* Taylor, 28 Eng. Law & Eq. 210; Potter *v.* Lansing, 1 Johns. 215; Dutton *v.* Solomonson, 3 Bos. & P. 582; Brown *v.* Hodgson, 2 Camp. 36; DeWolf *v.* Ins. Co. 20 Johns. 214; Griffith *v.* Ingledew, 6 S. & R. 429; Law *v.* Hatcher, 4 Blackf. 364; Green *v.* Clark, 12 N. Y. 343; Krulder *v.* Ellison, 47 N. Y. 36; Capehart *v.* Furnham Co., 16 South. Rep. 627 (Ala.)

[2] Dunlop *v.* Lambert, 6 Cl. & F. 600; Krulder *v.* Ellison, 47 N. Y. 36; Arbuckle *v.* Thompson, 37 Pa. St. 170.

[3] Hutch, Carr., § 734.

[4] Hutch., Carr., § 736; Blanchard *v.* Page, 8 Gray, 281; Fune *v.* R. Co., 112 Mass. 324; Hooper *v.* R. Co., 27 Wis. 81; South. Ex. Co. *v.* Croft., 49 Miss. 480.

agent or servant have a beneficial interest in the performance of the contract, or a special property or interest in the subject-matter of the agreement.[1]

§ 212. **Actions for Injury to or Interference with Goods.** —The carrier has a right of action for an injury to goods while in his possession, or against one who takes them out of his possession,[2] even though the wrongdoer be the owner, if they have been taken from him in violation of his right to their custody.[3] And his payment for lost goods transfers the property in them to him.[4]

§ 213. **Actions for Freight Charges.**—As we have seen,[5] before he receives goods to be carried, he is entitled to demand payment of a reasonable amount for the carriage; otherwise, he may refuse to carry. But where a carrier has undertaken the carriage of goods without such demand, and without payment being made, he not only has the right to retain the goods in his possession until his reasonable demands have been satisfied;[6] but should he have parted with the possession of the goods without a settlement of his claim, he may bring an action at law to recover compensation for his services.[7] This compensation is called "freight." The charges must be reasonable,[8]

1 Browne Carr., § 599; Thompson *v.* Fargo, 49 N. Y. 188.

2 Hutch., Carr., § 425; Merrick *v.* Brainard, 38 Barb. 574; White *v.* Bascom, 28 Vt. 268; Deford v. Seinour, 1 Ind. 532.

3 Hutch., Carr., § 428, citing Story, Bail., § 303; Young *v.* Kimball, 23 Pa. St. 193; Van Balaam *v.* Dean, 27 Mich. 104. He may sue the shipper of dangerous property whose goods have injured other property in his custody. The Nitro Glycerine Case., 15 Wall. 524; Pierce *v.* Winsor, 2 Sprague 35; Boston etc. R. Co. *v.* Shanly, 107 Mass. 568.

4 Hagarstown Bk. *v.* Adams Ex. Co., 45 Pa. St. 419; 84 Am. Dec. 499. The carrier may have a right by contract to keep the injured property on paying the owner its value. Chicago etc. R. Co. *v.* Katazenbach, 118 Ind. 174; 20 N. E. Rep. 709.

5 *Ante*, § 94.

6 See Post *Lien*.

7 Browne, Carr., § 457.

8 Killmer *v.* R. Co., 100 N. Y. 395; 53 Am. Rep. 194; Smith *v.* Findley, 34 Kas. 316; 8 Pac. Rep. 871.

and if not fixed by agreement, are regulated by what is customarily charged for similar services,[1] and include advances which he may have made to previous connecting carriers.[2] And he is entitled to freight only on the goods actually delivered at the place agreed upon.[3] But if they are delivered, the fact they are in an injured or worthless state does not affect the carrier's right to freight, but the consignee has his action for the damage, or may set it up against the carrier's claim.[4]

The consignee being presumptively the owner of the goods, becomes liable *prima facie* on his accepting them.[5] Yet if he is but the agent of the shipper, and this is known to the carrier, he cannot be held.[6] The consignor having made the contract of carriage, is, of course, liable,[7] though he may show by parol evidence that the carrier had agreed to look to another for his charges.[8]

§ 214. **Power to Sell.** —He has no right to sell the goods even to enforce his lien for his charges.[9] But

1 Lawson Us. & Cust. § 98; Bancroft *v.* Peters, 4 Mich. 619; Sutton *v.* R. Co., 11 Jur. N. S., 879; Middleton *v.* Hayward, 2 Nott & McC. 9; 10 Am. Dec. 554; Kirtland *v.* Montgomery, 1 Swan, 452.

2 White *v.* Vann, 6 Humph. 70; 44 Am. Dec. 294;

3 Gibson *v.* Sturge, 10 Ex. 622; Price *v.* Hartshorn, 44 Barb. 655; Steelman *v.* Saylor, 3 Ware, 52; The Collenberg, 1 Black, 170; Halwerson *v.* Cole, 1 Spear, 321; 40 Am. Dec. 603; Crawford *v.* Williams, 1 Sneed, 205; 60 Am. Dec. 146; Harris *v.* Rand, 4 N. H. 259; 17 Am. Dec. 421. But if consignee, or agent, is willing to dispense with the performance of the whole voyage, and voluntarily accepts the goods before the whole of the duty, imposed by the original contract, has been performed, a proportionate amount of freight will be due *pro rata itineris.* Browne Carr. § 465, The Newport, Swabey, 335; Abbott on Ship., p. 385, 11th ed.; The Nathaniel Hooper, 2 Sumn. 542; The Mohawk, 8 Wall. 153; Cook *v.* Gowan, 81 Mass. 237; M'Kibbin *v.* Peck, 39 N. Y. 262.

4 Whitney *v.* Ins. Co., 18 Johns. 208; McGaw *v.* Ocean Ins. Co., 23 Pick. 405; Griswold *v.* Ins. Co., 3 Johns. 321; 3 Am. Dec. 490; Hutch. Carr. § 446.

5 Hutch. Carr., § 448.

6 Hutch. Carr., § 448.

7 Hutch. Carr., § 451; Grant *v.* Wood, 21 N. J. L. 294; 47 Am. Dec. 162; Holt *v.* Westcott, 43 Me. 445; 69 Am. Dec. 74; Wooster *v.* Tarr, 8 Allen, 270; 85 Am. Dec. 707.

8 Wayland *v.* Mosely, 5 Ala. 430; 39 Am. Dec. 335.

9 Notara *v.* Henderson, L. R. 5 Q. B. 346; Saltus *v.* Everett, 20 Wend. 267; 32 Am. Dec. 541; Hunt *v.* Haskell, 24 Me. 339; 41 Am. Dec. 387; Myers *v.* Baymore, 10 Pa. St. 114; 49 Am. Dec. 586; Bailey *v.* Shaw, 24 N. H. 297; 55 Am. Dec. 241; Has-

a right is recognized in cases of controlling necessity—as where the goods are perishable[1]—and it may likewise be given by usage and custom.[2]

§ 215. **The Carrier's Lien.** —The common law, as some equivalent, perhaps, for the extraordinary responsibility which it imposes upon common carriers and innkeepers, gives them a lien on the goods entrusted to them for their reasonable charges. This right is enjoyed not only by the carrier of goods, but by the carrier of passengers as to such property as the passenger may take with him on the journey.

The lien of the carrier is a particular lien,[3] and though a general lien for all claims against the customer may be claimed under a well-settled and known usage or through a special contract between the parties;[4] yet the right to create such liens is restricted, and the doctrine as to the carrier's right to create a lien for a general balance of accounts, stands upon the same footing as the doctrine as to the carrier's right to limit his common-law liability, *i. e.*, it may not be created by a mere notice to the customer unassented to by him.[5] The right of retention, which the carrier has at common law, only extends to the amount which is owing for the carriage of the goods.[6] He cannot

sam *v.* Ins. Co., 7 La. Ann. 11; 56 Am. Dec. 591; Rugely *v.* Ins. Co., 7 La. Ann. 27); 56 Am. Dec. 603; Kitchell *v.* Vanadar, 1 Blackf. 359; 12 Am. Dec. 249; Rankin *v.* Packet Co., 9 Heisk, 564; 24 Am. Rep. 339; Briggs *v.* R. Co., 6 Allen, 246; 83 Am. Dec. 626. In some States he is given the right by statute. In such case he must use due diligence in obtaining a fair price. Nathan *v.* Shivers, 71 Ala. 117; 46 Am. Rep. 303.

1 Am. Ex. Co. *v.* Smith, 33 Ohio St. 511; 31 Am. Rep. 561.

2 Taylor *v.* Wells, 3 Watts, 65; Rapp *v.* Palmer, 3 Watts, 178; Pickering *v.* Busk, 15 East, 44; Kemp *v.* Coughtry, 11 Johns. 107. But see Bryant *v.* Commercial Ins. Co., 6 Pick. 131.

3 Rushforth *v.* Hadfield, 6 East. 522; Hartshorne *v.* Johnston, 7 N. J. (L.) 108; Wilson *v.* R. Co., 56 Me. 60; 96 Am. Dec. 435; Langworthy *v.* R. Co., 2 E. D. Smith 195; Galena etc. R. Co. *v.* Rae, 18 Ill. 488; 68 Am. Dec. 574; Ames *v.* Palmer, 42 Me. 197; 66 Am. Dec. 271; Pharr *v.* Collins, 35 La. Ann. 939; 48 Am. Rep. 251.

4 Hutch. Carr. § 477.

5 Browne Carr., § 429; McFarland *v.* Wheeler, 26 Wend. 467.

6 Adams *v.* Clark, 9 Cush. 215.

set up this right in order to recover incidental outlays, such as for warehouse-room,[1] or port charges,[2] or demurrage,[3] or for damages caused by the shipper through breaches of his contract or otherwise.[4] But it includes advances made to preceding carriers for their charges, where the bill of lading does not show that they have been paid.[5]

The carrier's right, it is held in England, is not affected by the fact that the consignor was not the owner of the goods, but he may retain them until his charges are paid, even where the actual proprietor claims his own,[6] this doctrine being founded upon the reasonableness that those who are bound by law to receive, should be paid for carrying. But while, as we have seen,[7] the American courts have conceded this right to the innkeeper, it is well settled, except perhaps in one State[8] in this country, that as against the true owner, the carrier has no lien for his charges upon the goods, but must, upon demand, surrender them to him.[9] In answer to the reason given for the English rule, the American courts say: "The carrier is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods unless the freight

1 The Virginia *v.* Kraft, 25 Mo. 76.

2 Faith *v.* East India Co., 4 B. & Ald. 630.

3 Crommelin *v.* R. Co., 4 Keyes 90.

4 Phillips *v.* Rodie, 15 East. 547; Burley *v.* Gladstone, 3 M. & S. 205; Gray *v.* Carr, L. R. 6 Q. B. 522.

5 Travis *v.* Thompson, 37 Barb. 236; Briggs *v.* R. Co., 6 Allen 246; Galena etc. R. Co. *v.* Rae, 18 Ill. 488; White *v.* Vann, 6 Humph. 70; Wells *v.* Thomas, 27 Mo. 17.

6 Yorke *v.* Greenaugh, 2 Ld. Raym. 867; Butler *v.* Woolcott, 2 N. R. 64; Turrell *v.* Crawley, 13 Q. B. 197; Johnson *v.* Hill, 3 Stark 172; Binns *v.* Pigot, 9 C. & P. 208.

7 See *ante*.

8 See King *v.* Richards, 6 Whart. 418.

9 Fitch *v.* Newberry, 1 Mich. 1; Van Buskirk *v.* Purinton, 2 Hall, 561; Collman *v.* Collins, 2 Hall 569; Stevens *v.* R. Co., 8 Gray 262; Clark *v.* R. Co., 9 Gray 231; Gilson *v.* Gwinn, 107 Mass. 126; Travis *v.* Thompson, 37 Barb. 236.

or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance."[1] The right of stoppage *in transitu* does not affect the carrier's lien.[2]

1 Robinson *v.* Baker, 5 Cush. 137.

2 Chandler *v.* Belden, 18 Johns. 157; Raymond *v.* Tyson, 17 How. 53; The Eddy, 5 Wall. 481; The Volunteer, 1 Sumn. 551.

PART III.

THE COMMON CARRIER OF PASSENGERS.

§ 216. **Introductory.** —Though the carrier of human beings is not strictly a bailee, yet on account of the similarity in many respects, of his position, the public interests which he serves, and the far-reaching scope of his employment at the present day, his duties and liabilities are measured by and enforced through those rules of the common law (with some variations), established in actions against the common carrier of goods. As in the law of insurance, the principles laid down by the courts in the earliest form of insurance, viz., marine, are applied in almost all their entirety to the more recent forms of insurance, fire, life, accident and the like, so it has been with the law of carriers of goods and persons.

In the following chapters we shall consider: I. The Relation of Carrier and Passenger in General (Cap. XIV); II. The Carrier's Duty in Regard to His Means of Transportation (Cap. XV); III. The Contract of Carriage (Cap. XVI); IV. The Duties and Liabilities of the Carrier During the Transit (Cap. XVII); V. The Responsibility for the Passenger's Baggage (Cap. XVIII); VI. The Liability of the Carrier for the Acts of Others (Cap. XIX); and VII. The Acts of the Passenger Himself as Affecting the Carrier's Liability (Cap. XX).

CHAPTER XIV.

THE RELATION OF CARRIER AND PASSENGER.

SECTION 217. Who are Common Carriers of Passengers.
218. Must Carry for all.
219. Where Payment of Fare Refused.
220. Where Service Demanded Outside his Holding out.
221. Where He has Insufficient Room.
222. Where Person has Conflicting Interests.
223. Where Person Dangerous or Offensive.
224. Waiver by Receiving.
225. Who are Passengers.
226. Servants of Carrier as Passengers.
227. At what Time Relation Begins.
228. During what Time Relation Continues.
229. At what Time Relation Ends.
230. Persons not Passengers to whom Carrier Owes Duty.

§ 217. **Who are Common Carriers of Passengers.** —A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. To constitute one a common carrier, it is necessary that he should hold himself out as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment. Railroad companies, the owners of ships, steamboats, ferries, omnibuses, street-cars, and stage-coaches, are usually common carriers of passengers.[1] The common carrier may trans-

[1] Nashville etc. R. Co. *v.* Messino, 1 Sneed, 220; Hanley *v.* R. Co. 1 Edm. Sel. Cas. 359; Peixotti *v.* McLaughlin, 1 Strob. 468; 47 Am. Dec. 563; Slimmer *v.* Merry, 23 Iowa 90; Richards *v.* Westcott, 2 Bosw. 589; Jencks *v.* Coleman, 2 Sum. 221; Bretherton *v.* Wood, 3 Brod. & B. 54; 9 Price, 408; Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455; Bennett *v.* Dutton 10 N. H. 481; Lovett *v.* Hobbs, 2 Show. 127.

port his passengers only within the limits of a town; as the owner of an omnibus or other vehicle plying between a railroad depot and a hotel,[1] or street-cars running upon a line whose terminal points are within the limits of the same city; or he may carry between adjacent or remote cities in the same country;[2] or the place to which he holds himself out to carry his passengers may be in a foreign country.[3] The carrier may be both a common carrier of passengers and a common carrier of goods by the same conveyance and at the same time.[4] The general rules in this respect, as to common carriers of goods, apply, it will be seen, to the common carrier of passengers.[5]

§ 218. **Must Carry for All.**—It is the duty of a common carrier of passengers, as distinguished from a private or special carrier of the same for hire, to receive all persons who apply to him to be carried. In this respect there is no difference between the principles which apply to a common carrier of goods and a common carrier of passengers. The reasons which have led to the imposition of this duty are the same in each case, viz., the injury which would arise to the public if a person were allowed publicly to profess to carry goods for all persons, and then refuse the goods of certain individuals. The same hardship would arise in the case of passengers, and hence the duty imposed on each is similar.[6] But to the general rule, there are again, several exceptions, viz.:

1 Parmelee *v.* Lowitz, 74 Ill. 116; 24 Am. Rep. 276.

2 Richards *v.* Westcott, 2 Bosw. 589.

3 Bennett *v.* Peninsular etc. Steamboat Co., 6 C. B. 775.

4 Thomp. Carr. Pass., 26.

5 See *ante*, § 83. He is subject to public regulation and control like the carrier of goods. See *ante* § 88. He cannot discriminate between different persons as to rates of fare. Ind. etc. R. Co. *v.* Rinard, 46 Ind. 293; State *v.* Overton, 24 N. J. (L.) 435; Chicago etc. R. Co. *v.* Parks, 28 Ill. 460; 68 Am. Dec. 562.

6 Browne, Carr. § 494. Bennett *v.* Dutton, 10 N. H. 481; Wheeler *v.* R. Co., 31 Cal. 46; 89 Am. Dec. 147; Westchester R. Co. *v.* Miles, 55 Pa. St. 209; 93 Am. Dec. 744; Stokes *v.* Saltonstall, 13 Pet. 181; Taney 11; Day *v.* Owen, 5 Mich. 520; 72 Am. Dec.

§ 219. **Where Payment of Fare Refused.**—The carrier has a right to refuse to carry a person who refuses to pay his fare or purchase a ticket.[1]

§ 220. **Where Service Demanded Outside His Holding Out.**—He may refuse to carry persons who present themselves for passage not at the regular station or customary places for receiving passengers,[2] or at times when he does not hold himself out as ready to carry;[3] or in vehicles on which he is not obliged to carry passengers, as for example, freight trains,[4] construction trains,[5] or mail or baggage cars,[6] or those who desire carriage to a point beyond his accustomed route, unless he has held himself out to carry to that point.[7]

§ 221. **Where He Has Insufficient Room.**—In regard to a want of room in his vehicles, the same rules apply as in the carriage of goods,[8] and if an unusual and unexpected number of people should present themselves, he might justify his refusal to receive more than he could accommodate, upon the same grounds.[9] But this would logically apply to those only with whom the carrier had not expressly contracted, for if a carrier by stage, car or boat should sell a ticket to a pas-

62; Pleasants *v.* R. Co., 34 Cal. 586; Tarbell *v.* R. Co., 34 Cal. 616; Hannibal etc. R. Co. *v.* Swift, 12 Wall. 263; Sanford *v.* R. Co., 2 Phila. 107; Benett *v.* Steam Co., 6 Com. B. 775; Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455; East Tenn. R. Co. *v.* Nelson, 1 Coldw. 272; Lake Erie etc. R. Co. *v.* Acres, 108 Ind. 548; 9 N. E. Rep. 453; Indianapolis etc. R. Co. *v.* Binard, 46 Ind. 293; Elmira *v.* Sands, 54 N. Y. 512; Beekman *v.* R. Co., 3 Paige. 45.

1 Thomp., Carr. Pass.; 29 Tarbell *v.* R. Co., 34 Cal. 616; Day *v.* Owen, 5 Mich. 520; Jencks *v.* Coleman, 2 Sumn., 221; Nashville etc. R. Co. *v.* Messino, 1 Sneed 220; Bretherton *v.* Wood, 3 B. & B. 54; Austin *v.* R. Co., 2 Q. B. 442; Ker *v.* Mountain, 1 Esp. 27.

2 O'Brien *v.* R. Co., 15 Gray. 20; 77 Am. Dec. 347.

3 Walsh *v.* R. Co., 42 Wis. 23.

4 See *post.*

5 Ohio etc. R. Co. *v.* Muhling, 30 Ill. 7; 25 Am. Rep. 353.

6 Kennedy Cent. R. Co. *v.* Thomas, 79 Ky. 160; 42 Am. Rep. 608; Houston etc. R. Co. *v.* Clemens, 55 Tex. 88; O'Donnell *v.* R. Co. 59 Pa. St. 239.

7 Wheeler *v.* R. Co., 31 Cal. 46.

8 See *ante*, § 97.

9 Chicago etc. R. Co. *v.* Carroll, 5 Ill. (App.) 200; Evansville etc. R. Co. *v.* Duncan, 28 Ind. 441; 92 Am. Dec. 323.

senger for a particular trip, then, as he would be bound to sell no more tickets than he had room for, it would seem that he would be absolutely liable to the contracting passenger, and a plea of want of room would be no defense.[1]

§ 222. **Where Person has Conflicting Interests.** —He may refuse a person whose object in coming on his vehicle is not carriage, but trade;[2] or one whose object is to interfere with the interests of the carrier; as, for instance, the agent of a rival line who intends to solicit custom.[3] But he may not refuse one because he has not commenced or does not intend to continue his journey on the carrier's line, or that of another favored carrier.[4]

§ 223. **Where Person Dangerous or Offensive.** —He may refuse to carry a suspected thief;[5] a gambler who intends to carry on his trade on the vehicle;[6] or a person who intends to assault another passenger;[7] a person so gross in his behavior and obscene in his language as to be a public nuisance;[8] a drunken person;[9] or one whose person or clothing is filthy and disgusting, or who is infected with vermin or with a contagious disease;[10] or one whose life would be in danger at the place of destination, or whose presence there would excite lawless violence.[11] Slight intoxication,

1 Hawcroft *v.* R. Co., 8 Eng. L. & Eq. 362; 16 Jur. 196; The Pacific, 1 Blatchf. 569.

2 The Pacific, 1 Blatchf. 569; Barry *v.* Oyster Bay etc. Co., 2 N. Y. S. C. 598; 67 N. Y. 301; 23 Am. Rep. 115; Barney *v.* The D. R. Martin, 11 Blatchf. 233; Smallman *v.* Whilter, 87 Ill. 545; 29 Am. Rep. 76.

3 Jencks *v.* Coleman, 2 Sum. 221.

4 Bennett *v.* Dutton, 10 N. H. 481.

5 Jencks *v.* Coleman, 2 Sum. 231.

6 Thurston *v.* R. Co., 4 Dill. 321.

7 Bennett *v.* Dutton, 10 N. H. 481.

8 Jencks *v.* Coleman, 2 Sum. 421.

9 Jencks *v.* Coleman, 2 Sum. 221; Vinton *v.* R. Co., 11 Allen 304; 87 Am. Dec. 715; Pittsburg etc. R. Co. *v.* Pillow, 76 Pa. St. 510; 18 Am. Rep. 424; Railroad Co. *v.* Hinds, 53 Pa. St. 512; Flint *v.* R. Co., 34 Conn. 554; Pittsburg etc. R. Co. *v.* Vandyne, 57 Ind. 576; 26 Am. Rep. 68.

10 Walsh *v.* R. Co., 42 Wis. 23; 24 Am. Rep. 376; Thurston *v.* R. Co., 4 Dill. 321.

11 Pearson *v.* Duane, 4 Wall. 605.

however, would not be a sufficient ground upon which to refuse a person passage on a public conveyance,[1] nor can the penalties which exclude unchaste women from society or public places be imported into the law of carriers, so long as there is nothing in their conduct or appearance at the time, which would be a valid reason for their refusal. Therefore, unless her conduct is offensive, a woman cannot be rejected as a passenger because she is a notorious prostitute.[2] And no one can be excluded from carriage by a common carrier on account of color, religious belief or political relations.[3]

§ 224. **Waiver by Receiving.**—As to both goods and passengers, the carrier must at the time they are received, make his objection and secure his right of refusal. If, instead of this he receives them knowing of the facts, his liability becomes the same as though no ground for refusal existed.[4] In the carriage of passengers, it has been held that when the passenger is received and the journey is begun, the carrier thereby consents to his being carried to his destination, notwithstanding that a reason exists which would have been sufficient in law to justify him, but which was unknown to the carrier, at the time the passenger was received.[5] But a carrier who waives his rights as to one person, is not bound to waive them as regards another person. "A carrier, like all others, may bestow favors when he chooses. Rights, not favors, are the subject of demand by all persons exclusively."[6] In

1 Pitts. etc. R. Co. *v.* Vandyne, *ante;* Putnam *v.* R. Co., 55 N. Y. 108; 14 Am. Rep. 191.

2 Brown *v.* R. Co., 7 Fed. Rep. 51.

3 Westchester etc. R. Co. *v.* Miles, 55 Pa. St. 209; 93 Am. Dec. 744; Chicago etc. R. Co. *v.* Williams, 55 Ill. 185; 8 Am. Rep. 641.

4 Hannibal etc. R. Co. *v.* Swift, 12 Wall. 262; St. Louis etc. R. Co. *v.* Flannagan, 27 Ill. (App.) 489; Evansville etc. R. Co. *v.* Duncan, 28 Ind. 441; 92 Am. Dec. 322.

5 Pearson *v.* Duane, 4 Wall. 605; Tarbell *v.* R. Co., 34 Cal. 616. But see Barney *v.* The D. R. Martin, 11 Blatchf. 233; Com *v.* Power, 7 Metc. 596; Thomp. Carr. Pass. 30.

6 Barney *v.* The D. R. Martin, 11 Blatchf. 233.

the Federal Court, it has been held that where a railroad sold a ticket to a person before discovering that he was one whom it had a right to exclude, it must return the consideration if it desires to recind the contract for transportation.[1] The same conclusion was reached where a passenger's tender of fare on the car was refused on the ground that an extra charge was required to be paid where tickets were not purchased in advance, and the passenger refused the extra amount and was ejected.[2]

§ 225. **Who Are Passengers.**—A passenger is one who is entitled to travel in some public conveyance, otherwise than in the service of the carrier, by virtue of a contract express or implied, with the carrier, and who is within the carrier's charge under such contract.[3]

There can be no contract relation with one who is on the carrier's vehicle by fraud, as for example, a stowaway, or one stealing a ride,[4] or one who has obtained a pass by misrepresentation,[5] or is riding on a nontransferable pass issued to another,[6] or one who pays no fare, and is permitted to ride free on a false representation to the conductor that he is an express messenger,[7] or one who is riding free by consent of the

1 Thurston *v.* R. Co., 4 Dill. 321.

2 Bland *v.* R. Co., 55 Cal. 570. And see Wright *v.* R. Co., 20 Pac. Rep. 770 (Cal).

3 No exact definition of a passenger is to be found in the books. That in Penn. R. Co. *v.* Price, 96 Pa. St. 267: "One who travels in some public conveyance by virtue of a contract expressed or implied with the carrier on the payment of fare or that which is accepted as the equivalent therefor" is faulty, in that a person may be a passenger though not *in* the conveyance at all. And see Bricker *v.* R. Co., 132 Pa. St. 1; 19 Am. St. Rep. 585. 18 Atl. Rep. 983. Mr. Patterson (Rail. Pas. L. 210) requires the contract to be for a valuable consideration, but it is well settled that one is a passenger though he pays no fare or the carrier receives no consideration whatever.

4 Laws. Rights, Rem. and Pr., § 1878; Hendryx *v.* R. Co., 45 Kas. 377; 25 Pac. Rep. 893.

5 Brown *v.* R. Co., 64 Mo. 536, or bought a ticket with counterfeit money. Memphis etc. R. Co. *v.* Chastine, 54 Miss. 503.

6 Toledo etc. R. Co. *v.* Beggs, 85 Ill. 80; 28 Am. Rep. 613; Way *v.* R. Co., 64 Ia. 48; 52 Am. Rep. 431; 19 N. W. Rep. 828. But see Great North. R. Co. *v.* Hanson, 10 Ex. 326.

7 Union Pac. R. Co. *v.* Nichols, 8 Kas. 501; 12 Am. Rep. 475; and see Higgins *v.* R. Co., 36 Mo. 418.

servants of the carrier, but in known violation of the carrier's rules.[1] A person who, on demand of his fare refuses to pay it, is not a passenger, and though the carrier may immediately eject him, yet if on account of fear of trouble he should be allowed to remain, he would not, thereafter, become a passenger.[2]

The carrier, by running his vehicle, by advertising the hours of departure, and his rates of fare, makes a general offer to the world to carry on the terms published, and persons, by presenting themselves at the proper place and time, with the intention of taking passage, accept the proposal and the contract is complete.[3] The carrier's regulations may properly require that a passenger must present a ticket or pay his

[1] Toledo etc. R. Co. *v.* Brooks, 81 Ill. 245; Brown *v.* R. Co., 64 Mo. 536; Eaton *v.* R. Co., 57 N. Y. 382; 15 Am. Rep. 513; Houston *v.* R Co., *v.* Moore, 49 Tex. 31; 30 Am. Rep. 98; Rucker *v.* R. Co., 61 Tex. 409; Chicago etc. R. Co. *v.* Michie, 83 Ill, 427; The Lion, L. R. 2 Adm. 102; Duff *v.* R. Co., 91 Pa St. 458; Jenkins *v.* R. Co., 41 Wis. 112; Woolsey *v.* R. Co., 58 N. W. Rep. 444 (Neb,). But the simple fact that the person is riding free does not make him the less a passenger. And if he has been invited by a servant of the carrier in charge of the vehicle, as the conductor of a train or the driver of a street car, to ride with him without charge he is properly there, having a right to assume that the servant has authority to extend this courtesy to his friends, even though he is acting in disobedience to his orders. The question always is does the person know that he is practicing a fraud on the carrier, in riding free. Wilton *v.* R. Co., 107 Mass. 108; 9 Am. Rep. 11; 125 Mass. 130; Washburn *v.* R. Co., 3 Head, 638; Austin *v.* R. Co., 8 Best & S. 327; McVeety *v.* R. Co., 45 Minn. 268; 47 N. W. Rep. 809; Sherman *v.* R. Co., 72 Mo. 62; Creed *v.* R. Co., 86 Pa. St. 139; Pitts. etc. R. Co. *v.* Caldwell, 74 Pa. St. 421; Gradin *v.* R. Co., 30 Minn. 217; 14 N. W. Rep. 881; Secor *v.* R. Co., 18 Fed. Rep. 221; Lucas *v.* R. Co., 33 Wis. 41; Muelhausen *v.* R. Co., 91 Mo. 344; 2 S. W. Rep. 315; McKern *v.* R. Co., 42 Mo. 79; Metropolitan etc. R. Co. *v.* Moore, 83 Ga. 453; 10 S. E. Rep. 730. And where one is carried free he is a passenger and entitled to all the rights of one. See *post* § 246. So where a railroad makes no charge for children of tender age in company of grown persons the former are passengers. Austin *v.* R. Co., 8 B. & S. 327; L. R. 2 Q. B. 442; Littlejohn *v.* R. Co., 148 Mass. 478; Todd *v.* R. Co., 3 Allen, 18; Com. *v.* R. Co., 108 Mass. 7. In a recent case in Ireland the novel question was presented whether where a female passenger was injured on a railroad, the plaintiff, an infant, being then *en ventre sa mere*, and being also permanently injured and crippled, could after her birth sue the carrier for her injuries. The question was decided in the negative mainly on the ground that the carrier had no knowledge of the plaintiff's presence on the train as a passenger. Walker *v.* R. Co., 28 Ir. L. R. 69. See a review of the case in 26 Am. L. Rev. 50.

[2] Highly *v.* Gilmer, 3 Mont. 90; 35 Am. Rep. 450.

[3] Lawson Contr. § 12. See *post.* Time-Tables § 237.

fare before entering the car or boat, or that part of his premises where his vehicles are, but if he leaves them open to anyone, then every person has a right to enter the vehicles without in any other manner notifying the carrier that he has accepted his offer.[1]

There can be no implied contract where a person boards a train, even though he intended to pay fare, which is not intended for the carriage of passengers,[2] as for example, a freight train,[3] or a car devoted exclusively to the railway mail service,[4] or goes upon the locomotive,[5] or a hand car,[6] or a pay car,[7]—for as the carrier has not offered to carry on such vehicles, there is no proposal on his part which the person can turn into a contract by acceptance. It would be different, of course, if the carrier should accept his fare, or if the servants of the carrier should know of his presence and consent to it.[8] But one who, by mistake, gets on a passenger train other than the one he intended to take passage upon, is nevertheless a passenger upon the train he is on.[9]

One is a passenger who is traveling lawfully on a carrier's vehicle though his purpose is not alone transportation, but is to carry on a trade or business on board for himself or for others. We have seen that the carrier may exclude such a person, but if he does not do so, he obtains all the rights of a passenger. Examples of this class of passengers are found in the

1 Cleveland *v.* New Jersey Steam Co., 68 N. Y. 306.

2 Eaton *v.* R. Co., 57 N. Y. 382.

3 Gardner *v.* R. Co., 51 Conn. 143; 50 Am. Dec. 12; Sherman *v.* R. Co., 72 Mo. 62; 37 Am. Rep. 432; Eaton *v.* R. Co., 57 N. Y. 382; Waterbury *v.* R. Co., 17 Fed. Rep. 671.

4 Bricker *v.* R. Co., 132 Pa. St. 1; 19 Am. St. Rep. 585; 18 Atl. Rep. 983.

5 Chicago etc. R. Co. *v.* Michie, 83 Ill. 428; Rucker *v.* R. Co., 61 Tex. 499.

6 Hoar *v.* R. Co., 70 Me. 65; 35 Am. Rep. 299.

7 South. etc. R. Co. *v.* Singleton, 66 Ga. 252.

8 Gardner *v.* R. Co., *supra;* Bricker *v.* R. Co., *supra;* Dunn *v.* R. Co. 58 Me. 187; 4 Am. Rep. 267.

9 Columbus etc. R. Co. *v.* Powell, 40 Ind. 37; Cincinnati etc. R. Co. *v.* Carper, 112 Ind. 26; 2 Am. St. Rep. 145; 13 N. E. Rep. 122; 14 *Id.* 352; Lake Shore etc. R. Co. *v.* Rosenweig, 6 Atl. Rep. 545.

government mail agents,[1] the messengers of express companies,[2] persons who, by contract with the carrier, have the right to sell refreshments or other articles of necessity or convenience on his cars or boats,[3] or one employed on or in charge of a private car drawn by a railroad company,[4] or a sleeping car owned by another corporation.[5]

Every one riding in a vehicle provided for passengers is presumed to be there lawfully as a passenger, having either paid or intending to pay his fare when called upon, and the *onus* is upon the carrier to prove that he was not.[6]

§ 226. **Servants of Carrier as Passengers.**—A servant of the carrier riding on his master's business on his master's conveyance, is not a passenger, and it is not material whether he was or was not at the time in charge of the vehicle or engaged in any service upon it.[7] Where the plaintiff traveled on a free pass from

[1] Collett *v.* R. Co., 15 Jur. 1053; Hammond *v.* R. Co. 6 S. C. 130; 24 Am. Dec. 467; Nolton *v.* R. Co., 11 N. Y. 444; 69 Am. Dec. 623; Seybolt *v.* R. Co., 95 N. Y. 562; 47 Am. Rep. 75; Mellor *v.* R. Co., 105 Mo. 455; 16 S. W. Rep. 49; Magoffin *v.* R. Co., 102 Mo. 540; 15 S. W. Rep. 76; Gulf etc. R. Co. *v.* Wilson, 79 Tex. 371; 15 S. W. Rep. 280. *Contra*, Penn. R. Co. *v.* Price, 96 Pa. St. 256.

[2] Yeomans *v.* Contra Costa Steam Nav. Co., 44 Cal. 71; Blair *v.* R. Co., 66 N. Y. 313; 23 Am. Rep. 55; Union Pac. R. Co. *v.* Nichols, 8 Kan. 505; 12 Am. Rep. 475; Brewer *v.* R. Co., 124 N. Y. 59; 26 N. E. Rep. 324; Wilton *v.* R. Co., 107 Mass. 108; Kenney *v.* R. Co., 125 N. Y. 426; 26 N. E. Rep. 626.

[3] Yeomans *v.* Contra Costa Steam Nav. Co. 44 Cal. 71; Com. *v.* R. Co., 108 Mass. 7; 11 Am. Rep. 30. But one who boards a car to sell to passengers newspapers or other articles, having no right to do so but merely permitted by the carrier's servants, is not a passenger. Fleming *v.* R. Co., 1 Abb. N. C. 433; Duff *v.* R. Co., 91 Pa. St. 454; 36 Am. Rep. 675; Blackmore *v.* R. Co., 38 U. C. Q. B. 172.

[4] Lockhart *v.* Lichtenthaler, 46 Pa. St. 151; Lackawanna R. Co. *v.* Chenewith, 52 Pa. St. 382; 91 Am. Dec. 168; Cumberland Valley R. Co. *v.* Meyers, 55 Pa. St. 288; see Torpey *v.* R. Co., 20 U. C. Q. B. 446.

[5] Jones *v.* R. Co., 28 S. W. Rep. 383 (Mo.)

[6] Penn. R. Co. *v.* Books, 57 Pa. St. 339; 98 Am. Rep. 230. The presumption that a person on a construction train is not lawfully thereon, may be overcome by evidence that the company is in the habit of allowing its employees to ride on such trains to and from their work or their homes. Rosenbaum *v.* R. Co., 38 Minn. 173; 8 Am. St. Rep. 653; 36 N. W. Rep. 447.

[7] Ryan *v.* R. Co., 23 Pa. St. 384; Gillshannon *v.* R. Co., 10 Cush. 228; Russell *v.* R. Co., 17 N. Y. 134; Tunney *v.* R. Co., L. R. 1 Com. P. 291; Seaver *v.* R. Co., 14 Gray 466; Kas. Pac. R. Co. *v.* Salmon, 11 Kas. 83; McQueen *v.* R. Co., 30 Kas. 689; 1 Pac. Rep. 139; Higgins *v.*

his home to his post of duty, to and back upon the defendant's cars, it was ruled that he was not a passenger, the court saying: "Although he had no particular duty to discharge while traveling, yet the traveling of the deceased was not as a passenger, but as an employee under the contract of service between him and the defendant."[1] But a servant of the carrier traveling on his employer's conveyance on his own (the servant's) business, is a passenger.[2]

The effect of the person being considered as a passenger or a servant, in an action for an injury received while on the vehicle, is very important. If the *status* of the person is that of a passenger, the carrier is answerable to him for any injury happening through very slight negligence, or a want of the very highest degree of care; whereas, if his *status* is that of servant, the carrier owes to him but ordinary care. Again, if he is a passenger, the carrier is answerable to him for injuries done to him by the servants of the carrier, in conformity with the rule of *respondent superior*. But if he is a servant of the carrier, this rule does not apply so as to make the latter responsible for injuries done to him by other servants of the carrier, engaged in the same common employment, *i. e.*, fellow servants.

§ 227. **At what Time Relation Begins.**—The mere purchase of a ticket, or the contracting to be car-

R. Co., 36 Mo. 418; Columbus etc. R. Co. *v.* Arnold, 31 Ind. 182. *Contra*, Fitzpatrick *v.* R. Co., 7 Ind. 436; Gillenwater *v.* R. Co., 5 Ind. 339; 61 Am. Dec. 101; O'Donnell *v.* R. Co., 59 Pa. St. 239; 98 Am. Dec. 336; 50 Pa. St. 490.

1 Vick *v.* R. Co., 95 N. Y. 267; 47 Am. Rep. 36; New York etc. R. Co. *v.* Burns, 17 Atl. Rep. 630 (N. J). But in this case it was held that as to *accommodations* such employee was entitled to the rights of a passenger. The car becoming crowded the conductor ordered him to give up his seat to a paying passenger and on his refusing ejected him. This was held to be wrong. "Whether," said the Court, "his relations to the company was that of servant or passenger, his right to transportation rested in contract. * * * In the absence of anything to the contrary, the right to transportation will be held to include the ordinary incidents of railroad carriage."

2 Ohio etc. R. Co. *v.* Muhling, 30 Ill. 9; 81 Am. Dec. 336; Doyle *v.* R. Co., 37 N. E. Rep. 770 (Mass). But see Higgins *v.* R. Co. 36 Mo. 418.

ried, does not make one a passenger; while it gives him a right to be carried, he is not a passenger until he has placed himself actually or constructively within the carrier's charge.[1] With or without a ticket or previous contract, or the payment of his fare, he is a passenger from the moment he enters the premises of the carrier set apart for the reception of passengers with the intention of taking passage.[2] He is a passenger while in the receiving place of the carrier waiting for the coach or train, or boat to come;[3] and so also where he is passing from the office of the carrier to the platform of the station, being all the time on the carrier's premises;[4] and so where he is in a coach owned by a railroad on his way to take a train, though he has not bought his ticket or announced his intention of traveling anywhere.[5]

In the case of street cars and other vehicles having no prescribed stopping places, one is a passenger just as soon as he reaches the vehicle in response to the carrier's express or implied invitation to board it.[6] In a leading English case, plaintiff held up his finger to the driver of an omnibus, who stopped to take him

1 June *v.* R. Co., 153 Mass. 79; 26 N. E. Rep. 238.

2 Brien *v.* Bennett, 8 Car. & P. 724; Davis *v.* R. Co., 10 How. Pr. 330; Cleveland *v.* New Jersey Steam Co., 68 N. Y. 306; Central R. Co. *v.* Perry, 58 Ga. 461; Hannibal etc. R. Co. *v.* Martin, 11 Ill. (App.) 386; Warren *v.* R. Co., 8 Allen 227; Gordan *v.* R. Co., 40 Barb. 546; Allender *v.* R. Co., 37 Ia. 264; Wabash etc. R. Co. *v.* Rector, 104 Ill. 276; Shannon *v.* R. Co., 78 Me. 52; 2 Atl. Rep. 678; Lake Shore etc. R. Co. *v.* Foster, 104 Ind. 293; 4 N. E. Rep. 20; Poucher *v.* R. Co. 49 N. Y. 263.

3 Gordan *v.* R. Co., 40 Barb. 546; Allender *v.* R. Co., 37 Iowa, 264; provided he comes a reasonable time before the departure of the train by which he is to travel. Harris *v.* Stevens, 31 Vt. 79; 73 Am. Dec. 337, the Court saying: "The situation of the station-house with reference to public houses, the distance that the intended traveler resides from the station, and many other considerations, should all be taken into account in determining the length of time that it would be reasonable for the person to come to the station and remain before the departure of the train on which he intended to take passage."

4 Warren *v.* R. Co., 8 Allen 227; 85 Am. Dec. 700; see Indiana etc. R. Co. *v.* Hudelson, 13 Ind. 325; 74 Am. Dec. 255.

5 Buffet *v.* R. Co., 40 N. Y. 168.

6 McDonough *v.* R. Co., 137 Mass. 210; Smith *v.* R. Co., 32 Minn. 1; 18 N. E. Rep. 827; McQuade *v.* R. Co., 53 N. Y. (S. C.) 91.

up, and just as he was putting his foot on the step of the omnibus, the driver drove on, and he fell on his face to the ground. It was held that he was a passenger.[1]

§ 228. **During what Time Relation Continues.** —And where the transportation has begun, the person remains a passenger so long as he is in the carrier's charge, whether he is present in or absent from the carrier's vehicle.[2] At a stopping place *en route* he has a right to alight, and the carrier is charged with the same degree of care while he is using the platform or stations of the carrier waiting for the journey to be resumed, as he is while the passenger is in the vehicle, and this is especially so where the stopping place is one where the passenger is invited to obtain necessary refreshments, or do other business.[3] So he is a passenger while walking from one of the carrier's con-

1 Brien *v.* Bennet, 8 C. & P. 724. It has been held that there is no invitation to a person to board a moving train, and that one who does so does not—at least until he has reached a place of safety inside the car (see Dewire *v.* R. Co., 148 Mass. 343; 19 N. E. Rep. 523)—become a passenger. Merrill *v.* R. Co., 139 Mass. 238; 1 N. E. Rep. 548; Paulitsch *v.* R. Co., 102 N. Y. 280; 6 N. E. Rep. 577; Perry *v.* R. Co., 66 Ga. 746. But one does not lose his rights as a passenger by alighting from the train on the wrong side. McKimble *v.* R. Co., 139 Mass. 542; 2 N. E. Rep. 97.

2 Clussman *v.* R. Co., 9 Hun., 618; 73 N. Y. 606; Keokuk etc. Packet Co., *v.* True, 88 Ill. 608.

3 State *v.* R. Co., 50 Me., 176; 4 Am. Rep. 259; Jeffersonville etc. R. Co. *v.* Riley, 39 Ind. 568; Ormond *v.* Hughes, 60 Tex. 180; Parsons *v.* R. Co., 113 N. Y. 358; 21 N. E. Rep. 145; Clussman *v.* R. Co., *supra;* Dodge *v.* Boston S. S. Co., 148 Mass. 207; 19 N. E. Rep. 373. In Haebrik *v.* Carr, 29 Fed. Rep. 298, a passenger at a steamboat landing had gone ashore to buy some tobacco and on returning fell from an unsafe gang plank and was drowned. The carrier was held liable, the Court saying: "The next question is one of law. In behalf of the defendant, it is said that if the decedent, as his wife says, attempted to go ashore to get tobacco, he placed himself outside his contract as a passenger, and the defendant was under no obligation to provide him a means of egress from the steamer for such a purpose. To this I cannot assent. In my opinion, the decedent, when on board as a passenger, had the right to go ashore when he did, and it was the duty of the defendant to provide a safe means of passage from the steamer to the pier. The necessity on the part of a passenger, who has taken his position as a passenger, to return to the pier is a common incident of travel. It is constantly done to find lost baggage, to speak to a friend, and may be done to purchase tobacco by any one addicted to the use of that weed."

veyances to another.[1] And where the transportation is temporarily suspended owing to some defect in the carrier's line, he is until it is resumed, and while in the carrier's charge, a passenger.[2]

§ 229. **At what Time Relation Ends.**—He remains a passenger until the journey has been concluded and he has left the carrier's premises,[3] or a reasonable time has elapsed in which he could have left the vehicle or the premises.[4] And one does not revive his status as a passenger by going back to the conveyance after having left it, for some purpose of his own, with no intention to continue his journey.[5]

§ 230. **Persons not Passengers to whom Carrier Owes Duty.**—There are certain persons who, though not passengers, yet to whom the carrier is liable to nearly the same extent as he is to passengers.[6] These are persons having business with the carrier, or duties to perform incidental to the arrival or departure of trains.

The carrier, by permitting or constructively inviting to his premises persons who come there to welcome a coming, or speed a parting guest or friend, is bound to protect them against injury while there.[7] Thus, a man, waiting at a railroad station for his wife to arrive by train, is entitled to have the premises in good order

1 Hulbert *v.* R. Co., 40 N. Y. 145; Northrup *v.* Rail. Pass. Assur. Co., 43 N. Y. 516; 3 Am. Rep. 724.

2 Dwinelle *v.* R. Co., 120 N. Y. 117; 24 N. E. Rep. 319.

3 Allerton *v.* R. Co. 146 Mass. 241; 15 N. E. Rep. 625; Heinlein *v.* R. Co., 147 Mass. 139; 9 Am. St. Rep. 676; 16 N. E. Rep. 698; Platt *v.* R. Co., 4 Th. & C. 406; Dodge *v.* R. Co., 148 Mass. 207; 19 N. E. Rep. 373; Pitts. etc. R. Co. *v.* Krause, *post*; Cincinnati etc R. Co. *v.* Carper, 112 Ind. 26; 13 N. E. Rep. 122; 14 Id. 352.

4 Inhoff *v.* R. Co., 20 Wis. 362; Pitts. etc. R. Co. *v.* Krouse, 30 Wis. 222.

5 Pitts. etc. R. Co. *v.* Krouse, 30 Wis. 222.

6 Patt. Ry. Acc. L. 215; Stiles *v.* R. Co., 65 Ga. 370.

7 Watkins *v.* R. Co., 37 L. T. (N. S.) 193 *Denman, J.*; Hamilton *v.* R. Co., 64 Tex. 251; Texas etc. R. Co. *v.* Best, 66 Tex. 111; 18 S. W. Rep. 224.

so that he shall suffer no injury.[1] So, a friend, seeing another off,[2] and one who is present assisting another on a train, must not be injured in alighting, by the want of care of the railroad.[3] And the same is true of a hackman who drives a passenger to the station,[4] and of the shippers or consignees of freight.[5] The principles of this section include also servants of a railroad while upon the line or premises of the defendant railroad, in the performance of their duty towards their employer.[6] In all these cases, the person must, of course, be free from contributory negligence.[7]

But persons resorting to stations not as intending passengers, or under any express or implied invitation, are mere licensees to whom a railroad is not liable for any injuries resulting from the condition of its premises or its failure to keep them in repair.[8] Thus, where a crowd of persons took refuge from a storm in a station, and it was blown down;[9] where a crowd

1 McKone *v.* R. Co., 51 Mich. 601; 47 Am. Rep. 596; 17 N. W. Rep. 74; see Kay *v.* R. Co., 65 Pa. St. 269; Davis *v.* R. Co., 58 Wis. 646; 17 N. W. Rep. 400; Murphy *v.* R. Co., 133 Mass. 121; Goodfellow *v.* R. Co., 106 Mass. 461; Barney *v.* R. Co., 92 N. Y. 289.

2 Atchison etc. R. Co. *v.* Johns, 36 Kas. 769; 14 Pac. Rep. 237.

3 Dorr *v.* R. Co., 59 Mo. 27; 21 Am. Rep. 371; Stiles *v.* R. Co., 65 Ga. 370; *Contra*, Lucas *v.* R. Co. 6 Gray, 64; 66 Am. Dec. 406, criticised in Thomp. Carr. Pass. 50. But in this case the plaintiff's contributory negligence was a sufficient bar.

4 Tobin *v.* R. Co., 59 Me. 183.

5 Holmes *v.* R. Co., L. R. 4 Ex. 123; Wright *v.* R. Co., L. R. 10 Q. B. 298.

6 Patt. Ry. Acc. L. 228 citing; Vose *v.* R. Co., 2 H. & N. 728; Graham *v.* R. Co., 18 C. B. (N. S.) 229; Snow *v.* R. Co., 8 Allen 441; Cent. R. Co. *v.* Armstrong, 49 Pa. St. 186; Brown *v.* R. Co., 40 U. C. Q. B. 333; Swamson *v.* R. Co., 3 Ex. Div. 341; Warburton *v.* Co., L. R. 2 Ex. 70; Penn. etc. R. Co. *v.* State, 58 Md. 374; Ill. Cent. R. Co. *v.* Frelka, 110 Ill. 498; Penn. Co *v.* Gallagher, 40 Ohio St. 637; re Merrill, 54 Vt. 200; Zeigler *v.* R. Co., 52 Conn. 543.

7 Lucas *v.* R. Co., 6 Gray. 65; Balt. etc. R. Co. *v.* Depew, 40 Ohio St. 121; Goldstein *v.* R. Co., 46 Wis. 404; 1 N. W. Rep. 37; Ragstad *v.* R. Co., 31 Minn. 208; Burns *v.* R. Co., 101 Mass. 50.

8 Patt. Ry. Acc. Law 185, citing *inter alia;* Gautret *v.* Egerton, L. R. 2 C. P. 374; Collis *v.* Selden, L. R. 3 C. P. 495; Southcote *v.* Stanley, 1 H. & N. 246; Wilkinson *v.* Fainie, 1 H. & C. 633; Ivory *v.* Hedges, 9 Q. B. Div. 80; Sutton *v.* R. Co., 66 N. Y. 243; Nicholson *v.* R. Co., 41 N. Y. 525; Larimore *v.* R. Co. 101 N. Y. 391; Severy *v.* Nicholson, 120 Mass. 306. And see also Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500; 22 Am. Rep. 112; Pittsburgh etc. R. Co. *v.* Bingham, *post;* Balt. etc. R. Co. *v.* Schwindling, 101 Pa. St. 258; 47 Am. Rep. 706; Lary *v.* R. Co., 78 Ind. 323; 41 Am. Rep. 572.

9 Pitts. etc. R. Co. *v.* Bingham, 29 Ohio St. 364; 23 Am. Rep. 751, and see Lary *v.* R. Co., *supra.*

gathered on a station platform to see the President of the United States, who was passing through the place, and the platform gave way,[1] in each case several being killed or injured, it was held that the railroad was not liable.

[1] "Had it been the hour for the arrival or departure of a train, and he [the plaintiff] had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of the defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who stand on it; as to all others, they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity or to give vent to his patriotic feelings. The defendants had nothing to do with that;" Gillis *v.* R. Co., 59 Pa. St. 129; 98 Am. Dec. 317.

CHAPTER XV.

THE DUTY AS TO MEANS OF TRANSPORTATION.

SECTION 231. Carrier of Passengers not an Insurer.
232. Duty as to Vehicles and Appliances for Transportation.
233. Duty as to Roadway.
234. Duty as to Receiving and Landing Places.
235. Duty to Adopt new Inventions for Safety.
236. Responsibility for Negligence of Manufacturer or Contractor.

§ 231. **Carrier of Passengers not an Insurer.** —The carrier of passengers is not subject to the extraordinary responsibility of the common carrier of goods. The intelligence of persons carried as passengers, their immunity from theft, their capacity to avoid dangers, and their liability through their own want of care to incur risks which are not incident to bales and boxes, must draw a broad distinction between the duties and liabilities which devolve upon and are incurred by a carrier who undertakes these dissimilar branches of the same trade.[1] He is not liable to a passenger as an insurer of his safety, because, being himself a rational being, it is presumed that the passenger will look after his own safety—as a reasonable being naturally would—except in so far as he must necessarily depend upon the carrier.[2] He does not then insure or warrant the safety of his passengers, but contracts to exercise the highest degree of care to preserve that safety.[3] And this liability, it must not be forgotten,

1 Browne, Carr., § 474.
2 Browne, Carr., § 476.
3 Lawson, Rights, Rem. & Prac., § 1907, citing Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455; Camden etc. R. Co. *v.* Burke, 13 Wend. 611; 28 Am. Dec. 488; Frink *v.* Coe, 4 G. Greene, 555; 61 Am. Dec. 141; Peters *v.* Rylands, 20 Pa. St. 497; 59 Am.

extends only to *passengers*, between whom and the carrier, there is a relation of trust and confidence and a *quasi bailment*. As to others, his duty is no greater than the duty of any one man towards another, viz., not to injure him through his actual or culpable neglect.[1]

§ 232. **Duty as to Vehicles and Appliances for Transportation.**—Though there are a few early English cases[2] and some American ones,[3] in which it is laid down that a carrier of passengers warrants the safety of his vehicles, on the ground that such a rule is one "plain and of easy application, and when once established, is distinct notice to all parties of their rights and liabilities * * and will work no more

Dec. 746; Hegeman *v.* R. Co., 13 N. Y. 9; 64 Am. Dec. 517; Edwards *v.* Lord, 49 Me. 279; Taylor *v.* R. Co., 48 N. H. 304; 2 Am. Rep. 220; Sales *v.* West Stage Co., 4 Iowa, 547; Baltimore etc. R. Co. *v.* Wightman, 29 Gratt. 431; 26 Am. Rep. 384; McElroy *v.* R. Co., 4 Cush. 400; 50 Am. Dec. 794; Warren *v.* R. Co., 8 Allen, 227; 85 Am. Dec. 700; Thayer *v.* R. Co. 22 Ind. 26; 85 Am. Dec. 409; State *v.* R. Co. 24 Md. 84; 87 Am. Dec. 600; Deyo *v.* R. Co., 34 N. Y. 9; 88 Am. Dec. 418; Johnson *v.* R. Co., 11 Minn. 296; 88 Am. Dec. 83; Hulsenkamp *v.* R. Co., 37 Mo. 547; 90 Am. Dec. 399; Morrissey *v.* Wiggin's Ferry Co., 43; Mo. 380; 97 Am. Dec. 402; Moore *v.* R. Co., 69 Iowa, 491; Knight *v.* R. Co., 56 Me. 234; 96 Am. Dec. 449; Simmons *v.* Steamboat Co., 97 Mass. 361; 93 Am. Dec. 99; Bowen *v.* R. Co. 18 N. Y. 408; 72 Am. Dec. 529; Brown *v.* R. Co., 34 N. Y. 404; Seymour *v.* R. Co., 3 Biss. 43; Redhead *v.* R. Co., L. R. 2 Q. B. 412; Christie *v.* Griggs, 2 Camp. 79; Ingalls *v.* Bills, 9 Met. 1; 43 Am. Dec. 346; Boyce *v.* Anderson, 2 Pet. 150; McKinney *v.* Neil 1 McLean, 540; McPadden *v.* R. Co., 44 N. Y. 478; 4 Am. Rep. 705; 47 Barb. 247; Ford *v.* R. Co., 2 Fost. & F. 730; Israel *v.* Clark, 4 Esp., 259; Burns *v.* R. Co., I. R. 13 C. L., N. S., 443; Pym. *v.* R. Co., 2 Fost. & F. 619, 621; Maury *v.* Talmadge, 2 McLean, 157; Carroll *v.* R. Co., 58 N. Y. 126; 17 Am. Rep. 221; Crogan *v.* R. Co., 18 Alb. L. J. 70; Sullivan *v.* R. Co., 30 Pa. St. 234; 72 Am. Dec. 698; Meier *v.* R. Co., 64 Pa. St. 225; 3 Am. Rep. 581; Stockton *v.* Frey, 4 Gill, 406; 45 Am. Dec. 138; Frink *v.* Potter, 17 Ill., 406; Jeffersonville R. Co. *v.* Hendricks, 26 Ind. 228, 231; Fairchild *v.* California Stage Co., 13 Cal. 599; McClary *v.* R. Co,, 3 Neb. 45; 19 Am. Rep. 631; Sawyer *v.* R. Co., 37 Mo. 240; 90 Am. Dec. 382; Keith *v.* Pinkham, 43 Me. 501; 69 Am. Dec. 80; White *v.* Boulton, 1 Peake. 113; Galena R. Co. *v.* Fay, 16 Ill. 558; 63 Am. Dec. 323; Nashville etc. R. Co. *v.* Elliott, 1 Cold. 611; 78 Am. Dec. 506; Chicago etc. R. Co. *v.* Landauer, 58 N. W. Rep. 434 (Neb.); San Antonio etc. R. Co., *v.* Long, 26 S. W. Rep. 114 (Tex.)]

1 State *v.* R. Co., 24 Md. 84; 87 Am. Dec. 600.

2 Bremner *v.* Williams, 1 C. & P., 414; Sharp *v.* Gray, 9 Bing. 457; 2 M. & S. 621; overruled in later cases; see Redhead *v.* R. Co., L. R. 2 Q. B. 12; 4 Id. 379.

3 Alden *v.* R. Co., 26 N. Y. 102; 82 Am. Dec. 401; overruled in Carroll *v.* R. Co., 58 N. Y. 126, 138, 139; McPadden *v.* R. Co., 44 N. Y. 478; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 290; Crogan *v.* R. Co., 18 Alb. L. J. 70.

burdensome results to carriers of passengers than to leave them, with the uncertain criterion of responsibility, to the trouble and expense of strongly litigated contests before juries,"[1]— these cases have been expressly or impliedly overruled. The modern English doctrine is best expressed in *Redhead* v. *Railway Company*,[2] where a passenger was injured by the breaking of the tire to a wheel of a railway carriage, in consequence of an air-bubble which had remained there in its original manufacture. It was shown that the occasional presence of air-bubbles in the tires of railway car wheels could not be prevented by any means known to the manufacturer of such wheels, and that their existence could not be discovered by any known tests. It was held that the passenger could not recover damages.

The principles of the law are discussed by the Judges at considerable length. Lush, J., before whom the case has been tried, and a verdict returned for the carrier, said: "A rule was granted for a new trial, on the ground that a carrier of passengers is bound at his peril to provide a roadworthy carriage, and is consequently liable if the carriage turns out to be defective, notwithstanding that the infirmity was of such a nature that it could neither be guarded against nor discovered. The question thus nakedly raised is one of vast importance at the present day, both to railway companies and passengers; and there being no case in our reports in which it has been argued and adjudicated, we took time to consider our judgment. Having done so, and given to the subject the best consideration in my power, I adhere to the opinion that the law imposes no such liability on railway companies; though, as my brother,

1 Allen *v.* R. Co., *supra*.

2 L. R. 2 Q. B. 412; 4 Id. 379.

Blackburn, has come to a different conclusion, I express that opinion with some degree of diffidence. It is not contended that the obligation of a carrier of passengers is co-extensive with that of a carrier of goods, who, by the custom of the realm, is placed in the position of an insurer, subject only to the exceptions of loss or damage by 'the act of God or the public enemies of the crown.' The reasons upon which that liability is based, and which are expressed by Holt, C. J., in *Coggs* v. *Bernard*,[1] and by Best, C. J., in *Riley* v. *Horne*,[2] are inapplicable to a carrier of passengers. The latter has not the same control over persons which he has over goods, nor the same opportunities of abuse and misconduct, the apprehension of which gave rise to this rigorous rule of law; and therefore, the law has never imposed upon him the responsibility of an insurer. The undertaking of a carrier of passengers, says Dr. Story in his work on Bailments,[3] is not an undertaking absolutely to 'carry safely,' but only to exercise 'due care and diligence in the performance of his duty.' But it is contended that in this particular part of his duty, viz., the providing a suitable vehicle, his undertaking goes beyond the measure of due care and 'diligence,' and includes a warranty that the carriage which he provides is sound and free from all defects which render it unfit for the service, though he has used every means in his power to make it sound, and though he could not by any amount of care, skill, or vigilance, have ascertained that it was not so. The language of Story, just quoted, does not suggest any such qualification, and surely so important an element in the contract about which he is treating would have been noticed by that learned writer if he had supposed it to exist. No such

1 2 Ld. Raym. 909, 918.
2 5 Bing. 217, 220.
3 § 601.

liability is, however, hinted at throughout the work; nor, as I am aware of, in any other text-book. The proposition is one which I cannot adopt without authority; because I can see no reason why a carrier should be held to warrant more than due care and diligence can enable him to perform, as respects the quality of his carriage, when it is admitted that he is under no such liability as respects the conduct or management of it. We were pressed with what were alleged to be analogous cases of a ship-owner, who is held to warrant the seaworthiness of his vessel, and of a manufacturer of goods ordered for a given purpose, who, it was contended, is held to warrant their fitness and sufficiency for that purpose. As to ship-owners, I agree there is abundant authority for the doctrine laid down; and moreover that there is no distinction, in this respect, between a carrier by water and a carrier by land. But it is to be observed that whenever this particular liability of a ship-owner is mentioned, it has reference to his obligation as the carrier of cargo. In that capacity he is an insurer of its safe delivery, subject only to the excepted perils. His warranty of seaworthiness, in such a case, springs out of, and necessarily results from the absolute duty he has undertaken; and it is not a warranty superadded to, and exceeding the terms and measure of, his contract to carry as it would be if it were extended to a carrier of passengers. A carrier of goods by land may, with equal propriety, be said to warrant the roadworthiness of his carriage, because he warrants against every casualty by which the goods might be lost or damaged on the journey. As regards the second case put, viz., that of the manufacturer who supplies goods to order for a given use or purpose, I do not stop to consider whether the analogy is so complete as the argument

assumes it to be, because it does not appear to me that the case mainly relied on, viz., *Brown* v. *Edgington*,[1] sanctions the doctrine which is sought to be deduced from it. Upon carefully examining the facts there, it will be found that no such question as that we have now to determine, arose in the case. The insufficiency of the rope was attributable to causes which imply blame in the manufacturer, viz., to either a want of judgment, or a want of care, or skill, both, or all. The rope was not strong enough for the purpose for which it was known by the defendant to have been required, it having been made of too small a size, or of faulty materials, or been badly put together; and whatever the cause of its failure was, it was one which might have been prevented, and it was assumed by the court, as it was assumed in the case of *Jones* v. *Bright*,[2] that the manufacturer might, and therefore ought, to have made it sufficient for the purpose. The main contest in the case was whether the defendant was liable, seeing that he was not the manufacturer of the rope, but had procured it from a rope-maker. The question of liability for a hidden, undiscoverable, and unavoidable defect was not present to the mind of any of the judges who decided that case. I cannot, therefore, regard it as an authority to the extent necessary to sustain the plaintiff's argument, nor am I aware of any other case on that point which established such a position. I do not feel it necessary to review in detail the cases which more directly bear upon the liability of a carrier of passengers. They are quoted by Story as the authorities for the rule which he lays down, and, in my judgment, they do not carry the liability further than he has stated it. In all of them, where it has become necessary to define that liability, the judges have care-

[1] 2 Man. & G. 279. [2] 5 Bing. 533.

fully distinguished between a carrier of passengers and a carrier of goods, and have pointedly declared that the liability of the former stands on the ground of negligence alone.[1] Undoubtedly there are expressions used in some of those cases which, if taken alone and without reference to the particular facts, favor the argument of the plaintiff. See per Lord Ellenborough, in *Israel* v. *Clark*;[2] Best, C. J., *Bremner* v. *Williams*;[3] and per Gaselee and Bosanquet, JJ., in *Sharp* v. *Grey*.[4] But reading such expressions as they should be read, in connection with and as applicable to the facts of each case, it is to my mind evident that the learned judges who used them did not intend them to be understood in the sense now imputed to them. The decisions in those cases in which such expressions are used, seem to me against the plaintiff, rather than decisions in his favor. In *Sharp* v. *Grey*,[5] the case most pressed in the argument by the plaintiff's counsel, as also in the case of *Christie* v. *Griggs*,[6] the axletree had, without any external cause to account for it, suddenly snapped. If there was such a warranty as is now insisted on, that warranty had clearly been broken, for the coach had turned out to be not roadworthy. There was, therefore, nothing to go to the jury but the amount of damages; whereas, in each case the question was left to the jury whether the defendant was liable as guilty of a want of due care or not. In *Sharp* v. *Grey*, the jury found a verdict for the plaintiff, which the court refused to disturb; in *Christie* v. *Griggs*, they found for the defendant, and no motion appears to have been made to set this verdict aside. Coming down to a more recent period, I find the same doctrines laid down by

1 See Aston *v* Heaven, 2 Esp. 533; Christie *v.* Griggs, 2 Camp. 79; Crofts *v.* Waterhouse, 3 Bing. 321.

2 4 Esp. 259.

3 1 Carr & P. 416.

4 9 Bing. 450.

5 9 Bing. 457.

6 2 Camp. 79.

the Lord Chief Justice of this court in *Stokes* v. *Eastern Counties Railway Company*.[1] That was a case exactly similar to the present. The wheel had broken from a latent flaw in the welding, and great injury had been done to several passengers. After a very lengthened trial, the jury found a verdict for the defendants; and although the plaintiff in that case, and many other persons, were deeply interested in questioning the ruling of the Lord Chief Justice, no attempt was made to set aside the verdict.

"As far, therefore, as the authorities in this country go, they are against the position taken by the plaintiff; and considering that many such accidents have occurred since the introduction of railways, the fact that this is the first time so extensive a liability has been insisted on, argues a general impression against it. But though the question has not before been presented for solemn adjudication in this country, it has been raised more than once in the courts of the United States, and in every case the judgment has been in favor of the carrier. In *Ingalls* v. *Bills*,[2] the court delivered an elaborate judgment, reviewing all the authorities, English and American, and affirming the doctrine that a carrier of passengers is liable only for negligence. For these reasons, I am of opinion that the rule must be discharged." Mellor, J., concurred with Lush, J., while the third member of the court (Blackburn, J.), dissented in an elaborate opinion which concludes as follows: "The question, therefore, is distinctly raised, whether the obligation of the carrier of passengers to the passenger is merely to take every precaution to procure a vehicle reasonably sufficient for the service, whether by sea or by land, in which case the direction was right; or whether it is, as I think, an

[1] 2 F. & F. 691.

[2] 9 Metc. 1; 43 Am. Dec. 346.

absolute obligation, at his peril, to supply one, or be responsible for any damage resulting from a defect."

The case was appealed to the Exchequer Chamber, where, after the case had been again argued, the judgment of the court (Kelly, C. B.; Byles, Keating, and M. Smith, JJ.; Channell and Bramwell, BB.) was delivered by Montague Smith, J., who said: "The question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious that for the plaintiff, on this state of facts, to succeed in this action, he must establish either that there is a warranty by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or, as the learned counsel mainly insisted, a warranty that the carriage in which he travels shall be in all respects perfect for its purpose,—that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected their existence. We are of opinion, after consideration of the authorities, that there is no such contract, either of general or limited warranty and insurance, entered into by the carrier of passengers, and that the contract of such a carrier, and the obligation undertaken by him, are to take due care (including in that term the use of skill and foresight), to carry a passenger safely. It of course follows that the absence of such care—in other words, negligence—would alone be a breach of this contract; and as the facts of this case do not disclose such a breach, and on the contrary negative any want of skill, care, or foresight, we think the plaintiff has failed to sustain his action, and that the judgment of the court below, in favor of the defendant, ought to be affirmed.

"The law of England has, from the earliest times, es-

tablished a broad distinction between the liability of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to re-deliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers), has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm, or the common law declared long ago, that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. * * * The court is now asked to declare the same law to be applicable to contracts to carry passengers. The learned counsel for the plaintiff felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for and mainly relied on the proposition that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carriers of goods in this respect ought to be imported into the contract with the passenger. But first, it is extremely doubtful whether such warranty can be predicated to exist in the contract of a common carrier of goods. His obligation is to carry and re-deliver the goods in safety, whatever happens. In the words of Lord Holt, 'he is bound to answer for the goods at all events.' Again, 'The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the king.' And this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle; for if the goods are safely carried and re-delivered, it

would be immaterial whether the carriage was roadworthy or not; and if the goods are lost or damaged, the carrier is liable on his broad obligation to be answerable 'at all events,' and it is unnecessary to inquire how that loss or damage arose.

"But, however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be dissected, and a particular part of it severed and attached to what, on the hypothesis, is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods, applied with equal force to impose the limited warranty of the soundness of the carriage in favor of the passenger. The reason suggested was, as we understood it, that a passenger, when placed in a carriage, was as helpless as a bale of goods, and therefore, entitled to have for his personal safety, a warranty that the carriage was sound; but this is not the reason, or anything like the reason, given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is, no doubt, dependent on the soundness of the carriage in which he travels; but in the case of a passenger on a railway, it is no less dependent on the roadworthiness of the other carriages in the same train, and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact, of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all. If, then, there is force in the above

reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and, if so, it must follow as a consequence of the argument that there is a warranty that all these things should be and remain absolutely sound and free from defects. This, which appears to be the necessary consequence of the argument, although Mr. Mainsty disclaimed the desire to press it so far, tries the value of it. But surely, if the law really be as it is now contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects or unsoundness in the rolling-stock, others from defects in the permanent works. Long inquiries have taken place as to the causes of these defects, and whether they were due to want of care and skill, and these inquiries would have been altogether immaterial if warranties of the kind now contended for formed part of the contract. An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when, from the nature of things, defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man, by implication of law and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, *Lex non cogit ad impossibilia*, *Nemo tenetur ad impossibilia*. If the principle of implying a warranty is to prevail in the present case, there seems to be no good reason why it should not be equally applied to a variety of

other cases—as, for instance, to the managers of theaters and other places of public resort, who provide seats or other accommodation for the public. Why are they not to be equally held to insure by implied warranty the soundness of the structures to which they invite the public? But we apprehend it to be clear that such persons do no more than undertake to use due care that their buildings shall be in a fit state. * * * Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given. We have already gone fully into the reasons for holding that, in our opinion, the warranty contended for in this case is not so founded. On the other hand, it seems to be perfectly reasonable and just to hold that the obligation well-known to the law, and which, because of its reasonableness and accordance with what men perceive to be fair and right, has been found applicable to an infinite variety of cases in the business of life, viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent, and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. 'Due care,' however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that

whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected. In the result, we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and so far as it rests on principle, fails in reason. Consequently, the judgment of the Court of Queen's Bench in favor of the defendants, will be affirmed."

The well-settled American doctrine is summed up by Mr. Justice Harlan, in *Pennsylvania Railroad Company* v. *Roy*,[1] in these words: "The carrier of passengers is responsible for injuries received by passengers in the course of their transportation, which might have been avoided or guarded against by the exercise, on his part, of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him, is the important one of providing cars or vehicles adequate, that is sufficiently secure, as to strength and other requisites for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages."[2] And this extends to all appli-

[1] 102 U. S. 456.

[2] Hegeman *v.* R. Co., 13 N. Y. 9; 64 Am. Dec. 517; Curtis *v.* Co., 18 N. Y. 534; 74 Am. Dec. 258; Smith *v.* R. Co., 29 Barb.

ances for transportation. He is not liable for latent defects which careful examination would not have revealed,[1] but he is liable if the defect could have been discovered by any test known to a man skilled in the business of manufacturing such vehicles,[2] and it is not material that any or all skillful manufacturers had, up to the time of the accident in question, omitted certain known tests, the use of which would have prevented the accident.[3]

The responsibility of the carrier extends as well to things inside the vehicle as to its running parts; as for example, where a lamp shade fell from a lamp hanging in the car, the carrier was held liable;[4] and as the passenger is entitled to be comfortably carried, want of care in heating a car whereby a passenger takes cold, is ground for an action for damages.[5]

§ 233. **Duty as to Roadway.**—A railroad which carries passengers is as responsible for the state of the rails and bridges, the condition of the road bed, and the like, as it is for the safe construction and keeping of the cars.[6] It is not liable for an injury happening through latent defects in its roadway, bridges, or other permanent structures, where it has bestowed

132; 19 N. Y. 13; St. Louis etc. R. Co. *v.* Velarms, 56 Ind. 511; La Barem *v.* R. Co., 11 Allen, 312; America S. S. Co. *v.* Landreth, 102 Pa. St. 131; Smith *v.* British etc. Co., 86 N. Y. 408; Cincinnati etc. R. Co. *v.* Walroth, 38 Ohio St. 411; McPadden *v.* R. Co., 44 N. Y. 478; Grand etc. R. Co. *v.* Boyd, 65 Ind. 325; Costello *v.* R. Co., 65 Barb. 92; Toledo etc. R. Co. *v.* Beggs, 88 Ill. 80; Robinson *v.* R. Co., 20 Blatchf. 338.

1 Peoria etc. R. Co. *v.* Thompson, 56 Ill. 138; Meier *v.* R. Co., 64 Pa. St. 225; 3 Am. Rep. 581; Ingalls *v.* Bills, 9 Met. 1; 43 Am Dec. 346; Phila. etc. R. Co. *v.* Thompson, 56 Ill. 136; Ladd *v.* R. Co., 119 Mass. 412; 20 Am. Rep. 331; Yerkes *v.* Keokuk etc. Co., 7 Mo. (App.) 265; Hadley *v.* Cross, 34 Vt. 586.

2 Hegeman *v.* R. Co., 13 N. Y. 9; 64 Am. Dec. 517.

3 Curtis *v.* New Jersey Steam Co., 47 N. Y. 282.

4 White *v.* R. Co., 11 N. E. Rep. (Mass.) 552.

5 Bryan *v.* R. Co., 32 Mo. (App.) 228.

6 Hanley *v.* R. Co., Edm. Sel. Cas. 359; Tyrrell *v.* R. Co., 111 Mass. 546; McElroy *v.* R. Co., 4 Cush. 400; 50 Am. Dec. 794; McPadden *v.* R. Co., 44 N. Y. 478; 4 Am. Rep. 705; Louisville etc. R. Co. *v.* Pedigo, 108 Ind. 491; 8 N. E. Rep. 627; Union Pac. R. Co. *v.* Hand, 7 Kas. 380; Nashville etc. R. Co. *v.* Messino, 1 Sneed, 320; Virginia etc. R. Co. *v.* Sanger, 15 Gratt. 230.

the highest measure of care upon the construction, the inspection, and the reparation of them.[1] Nor is it liable for their being washed away or undermined by a violent storm whose effects it could not have provided against.[2] So a railroad must employ the highest care and diligence in guarding its track and keeping it free from obstructions.[3]

§ 234. **Duty as to Receiving and Landing Places.** —The carrier is bound also to use the same high degree of care to keep in a safe condition all portions of his platforms, and approaches thereto, and all portions of his station-grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on his cars, or passengers using them during the transit, or leaving the cars are likely to go.[4] This duty has not been performed where snow or ice is allowed to accumulate upon the platform,[5] or the platform is dangerously higher than the car steps,[6] or not properly lighted at night,[7] or there are holes in it, into which the pas-

1 Hanley *v.* R. Co., Edm. Sel. Cas. 359; McPadden *v.* R. Co., 44 N. Y. 478; 4 Am. Rep. 705; Douglass *v.* Champlain Trans. Co , 50 N. Y. 1; Cochran *v.* North Shore etc. Ferry Co., 50 N. Y. 656.

2 Ellett *v.* R. Co., 76 Mo. 518; Phila. etc. R. Co. *v.* Anderson, 94 Pa. St. 351; 39 Am. Rep. 787; Railroad Co. *v.* Halloran, 53 Tex. 46; 37 Am. Rep. 744; Brehm *v.* R. Co., 34 Barb. 256.

3 Virginia etc. R. C. *v.* Sanger, 15 Gratt. 230.

4 McDonald *v.* R. Co., 26 Iowa 125; 96 Am. Dec. 114; 29 Iowa 170; Liscomb *v.* R. Co., 6 Lans. 75; Hulbert *v.* R. Co., 40 N. Y. 145; Knight *v.* R. Co., 56 Me. 234; 96 Am. Dec. 449; Louisville etc. R. Co. *v.* Wolfe, 80 Ky. 82; Van Ostran *v.* R. Co., 35 Hun. 590; Caswell *v.* R. Co., 98 Mass. 194; 93 Am. Dec. 151; New York etc. R. Co. *v.* Doane, 115 Ind. 435; 7 Am. St. Rep. 451; 17 N. E. Rep. 914; Reed *v.* Axtell, 34 Va. 231; 4 S. E. Rep. 587; Clussman *v.* R. Co., 9 Hun. 618; Montgomery etc. R. Co. *v.* Boring, 51 Ga. 582; Toledo etc. R. Co. *v.* Grush, 67 Ill. 262; Tobin *v.* R. Co., 59 Me. 183; 8 Am. Rep. 415; Weston *v.* R. Co., 73 N. Y. 595; Beard *v.* R. Co., 48 Vt. 101; Penn. R. Co. *v.* Henderson, 51 Pa. St. 315; McKone *v.* R. Co., 51 Mich. 601; 17 N. W. Rep. 74; Brassell *v.* R. Co., 84 N. Y. 241; Dobiecki *v.* Sharp, 88 N. Y. 203; Chicago etc. R. Co. *v.* Scates, 90 Ill. 586; St. Louis etc. R. Co. *v.* Cantrell, 37 Neb. 519.

5 Weston *v.* R. Co., 10 Jones & S. 156; Seymour *v.* R. Co., 3 Biss. 43; Memphis etc. R. Co. *v.* Whitfield, 44 Miss. 466; 7 Am. Rep. 697.

6 Turner *v.* R. Co., 37 La. Ann. 648; 55 Am. Rep. 514.

7 Stewart *v.* R. Co., 53 Tex. 289; 37 Am. Rep. 753; Nicholson *v.* R. Co., 3 H. & C. 534; Forsyth *v.* R. Co., 103 Mass. 510; Jamison *v.* R. Co., 55 Cal. 573; Quaife *v.* R. Co., 48 Wis. 513; 4 N. W.

senger steps or falls,[1] or obstructions of any kind,[2] or trains are permitted to pass over tracks which passengers are obliged to cross to reach the cars,[3] or passengers are obliged to cross other trains to reach the one required;[4] or articles are permitted to be thrown on the platform from passing trains,[5] or any part of a moving train projects over the platform.[6] Where passengers are compelled to cross tracks to reach or leave trains, the railroad must see to it that they can do so in safety.[7]

As illustrations of cases where one may be injured on the carrier's platform without the carrier being responsible because no negligence appears, may be cited one where a weighing machine stood on the platform, the foot of which projected six inches above its level, and a person was pushed against it by the crowd and was injured, and it was shown that it had stood there for five years and done no harm;[8] another where the steps leading from the station were edged with brass, and a passenger slipped, although others had used the same stairs for months without injury;[9] an-

Rep. 658; Peniston *v.* R. Co., 34 La. Ann. 777; 44 Am. Rep. 444; Stewart *v.* R. Co., 53 Tex. 289; 37 Am. Rep. 753; Patten *v.* R. Co., 32 Wis. 524; 36 *Id.* 413; Dice *v.* Willamette Co., 8 Oreg. 60; 34 Am. Rep. 375; Osborn *v.* Union Ferry Co., 53 Barb. 629; Rennecker *v.* R. Co., 20 S. C. 219; Beard *v.* R. Co., 48 Vt. 101; Buenemann *v.* R. Co., 32 Minn. 370; 20 N. W. Rep. 379.

[1] Knight *v.* R. Co., 56 Me. 234; 96 Am. Dec. 449; Chicago etc. R. Co. *v.* Fillmore, 57 Ill. 265; Liscomb *v.* R. Co., 6 Lans. 75.

[2] Osborn *v.* Union Ferry Co., 53 Barb. 629; Martin *v.* R. Co., 16 C. B. 179; Nicholson *v.* R. Co., 3 C. & H. 534.

[3] Balt. etc. R. Co. *v.* State, 60 Md. 449; Klein *v.* Jewett, 26 N. J. (Eq.) 474.

[4] Keating *v.* R. Co., 3 Lans. 469.

[5] Carpenter *v.* R. Co., 97 N. Y. 494; 49 Am. Rep. 540; Snow *v.* R. Co., 136 Mass. 40; 49 Am. Rep. 40; Jefferson etc. R. Co. *v.* Riley, 34 Ind. 568; Toledo etc. R. Co. *v.* Maine, 67 Ill. 298.

[6] Dobiecki *v.* Sharp, 88 N. Y. 403; Langan *v.* R. Co., 72 Mo. 392; Chicago etc. R. Co. *v.* Wilson, 63 Ill. 167.

[7] Penn. R. Co. *v.* Zebe, 33 Pa. St. 318; Klein *v.* Jewett, 26 N. J. Eq. 474; Chicago etc. R. Co. *v.* Wilson, 63 Ill. 167; Armstrong *v.* R. Co., 66 Barb. 437; 64 N. Y. 635; Keller *v.* R. Co., 24 How. Pr. 172; Whalen *v.* R. Co., 60 Mo. 323; State *v.* R. Co., 58 Me. 176; 4 Am. Rep. 258; Dublin etc. R. Co. *v.* Slattery, 3 Ir. App. Cas. 1155; I. R. 10 C. L. 256; I. R. 8 C. L. 531; 39 L. T., N. S., 265; 19 Alb. L. J. 70; Terry *v.* Jewett, 78 N. Y. 338; Brassell *v.* R. Co., 84 N. Y. 241; Warren *v.* R. Co., 8 Allen 227; Gaynor *v.* R. Co., 100 Mass. 208; Chaffee *v.* R. Co., 104 Mass. 108; Green *v.* R. Co., 11 Hun. 333; Balt. etc. R. Co. *v.* State, 60 Md. 449.

[8] Cornman *v.* R. Co., 4 H. & N. 781; 29 L. J. (Eq.) 94.

[9] Crafter *v.* R. Co., L. R. 1 C. P. 300; Cochran *v.* North Shore Ferry Co., 56 N. Y. 656; Rennecker *v.* R. Co., 20 S. C. 219.

other where a stray dog on the platform bit a passenger;[1] another where a man driving a sled off a ferry boat, struck an uneven surface on the boat, which stopped the sled with a jolt and did damage;[2] another where a girl tripped over the rail as she was crossing the tracks.[3] In all these cases, the reason for not holding the carrier liable was that it was but reasonable to anticipate no mischief would arise, since none had resulted under the same circumstances for a long period.

§ 235. **Duty to Adopt New Inventions for Safety.** —The high degree of care required of the carrier makes it necessary for him to adopt, so far as is practicable, the latest improvements in his means of transportation, which have been found by experience well adapted to increase the safety of his passengers. And this, it is said, is especially true when he undertakes to carry passengers by the dangerous agency of steam.[4] Where the limit of this duty lies must, in general, be a question of fact for the jury.[5] A carrier is not bound to adopt a new and improved method because safer or better than the methods already employed by him, if it is not requisite to the *reasonable* safety or convenience of his passengers; and if the expense is excessive, the cost of such improved method may be a sufficient reason for refusing to adopt it.[6]

§ 236. **Responsibility for Negligence of Manufacturer or Contractor.**—Hence, the law is, that the carrier is bound to use the most exact diligence, and is answerable for any negligence, however slight. And this is true, not only of a default which is due to

1 Smith *v.* R. Co., L. R. 2 C. P. 4.
2 Le Barron *v.* East Boston Ferry Co., 11 Allen 312.
3 Potter *v.* R. Co., 92 N. C. 541.
4 Thomp. Carr. Pass. 215; Patt. Ry. Acc. L. 224; Meier *v.* R. Co., 64 Pa. St. 225.
5 Hegeman *v.* R. Co., *supra.*
6 Le Barron *v.* East Boston Ferry Co., 11 Allen 312; Taylor *v.* R. Co., 48 N. H. 316.

the carrier himself, but of any default of those employed by him, or of those from whom he has purchased anything which he uses in the conveyance of passengers, and which, from a want of skill in its construction, may cause injury to any of the carrier's passengers.[1] It is not enough that the manufacturer from whom the carrier purchases his vehicles or appliances, or the contractor who builds his bridges, or lays his track, was reputed to sell only the best goods or to do only the best work; what is required is not only that he had capacity, but that he exercised it in the particular instance.[2]

[1] Browne Carr., § 490; Hegeman *v.* R. Co., 13 N. Y. 9; 64 Am. Dec. 517; Caldwell *v.* Steam. Co., 47 N Y. 282; Carroll *v.* R. Co., 58 N. Y. 126; 17 Am. Rep. 221; Burns *v.* R. Co., I. R. 13 C. L., N. S. 543; Francis *v.* Cockrell, L. R. 5 Q. B. 184; Curtis *v.* R. Co., 18 N. Y. 538; 75 Am. Dec. 258; Perkins *v.* R. Co., 24 N. Y. 219; 82 Am. Dec. 281; Bissell *v.* R. Co., 252 N. Y. 445; 82 Am. Dec. 369; Brown *v.* R. Co., 34 N. Y. 408; Steinweg *v.* R. Co., 43 N. Y. 123; 3 Am. Rep. 673; Pitts. etc. R. Co. *v.* Nelson, 51 Ind. 150; Ill. Cent. R. Co. *v.* Phillips, 49 Ill. 234; *contra*, Grand Rapids R. Co. *v.* Huntley, 38 Mich. 537; 31 Am. Rep. 321; Nashville etc. R. Co. *v.* Jones, 9 Heisk. 27, cases often criticised and condemned. See Hutch. Carr., § 512; Thomp. Carr. Pass. 221; also 31 Am. Rep. 324.

[2] Hegeman *v.* R. Co., *supra.*

CHAPTER XVI.

THE CONTRACT OF CARRIAGE

SECTION 237. Time Tables as General Offers.
238. Offer Turned into Contract by Purchase of Ticket.
239. Liability for not Running according to Time Table.
240. Tickets as Contracts.
241. Ticket good for Continuous Trip.
242. Limitations as to Time.
243. Assignability of Ticket.
244. Ticket Conclusive of Passenger's Rights.
245. Limiting Liability for Negligence — as to Paying Passengers.
246. Duty towards Free or Paying Passenger the same.
247. Who are Free Passengers.
248. Limiting Liability for Negligence—as to Free Passengers.
249. Arguments in Support of the Different Views.
250. Special Contracts with Passengers.

§ 237. **Time Tables as General Offers.**—Two views of the status of a railroad time table are to be found in the adjudged cases; one that its publication and distribution to the public is an offer addressed to all intending passengers, which, by the purchase of a ticket, or the tender of the legal fare becomes an absolute contract between the carrier and the passenger; the other that it is only a representation to the public that the company's trains ordinarily run at the times stated, and that the company will use due care and diligence to carry out the representation, but that it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the carrier liable for want of punctuality which is not attributable to his negligence. The application of the first view would make the company absolutely

liable, and no defense of accident or the act of God, or causes beyond the carrier's control would be admissible—for it is an elementary principle of the law of contracts that one who promises absolutely and unconditionally, is bound absolutely and unconditionally.[1] *Denton* v. *Great Northern Railroad Company*,[2] is the leading case in support of the first view. There the defendant's time-table advertised that a certain train would leave London at a certain time and arrive at other stations along the route at specified times. The plaintiff went to the station at the advertised time intending to take passage, demanded a ticket from the clerk and tendered the price of it, but as the train had been taken off, the clerk refused to issue the ticket. In an action against the company, Campbell, C. J., said: "It seems to me that railways would not be that benefit and accommodation to the public which we find them to be, if the representations made in their time-tables are to be treated as so much waste paper, and not considered as the foundation of a contract. I think the plaintiff is entitled to recover, both on the ground that there was a contract, and also for a false representation. I think there was a binding contract, and that the case is the same as if the company should publish in express terms, that if customers would come to a particular station at a particular hour, a train would be passing at that hour, or near the hour, and that any person who tendered his fare should have a ticket, and be carried from that station to some other given station." One judge dissented from the judgment of the chief justice, and it is to be observed that the evidence showed that the time-table had been published after the train had been discon-

1 Lawson Contr. § 420.

2 5 E. & B. 860, and see Hawcroft *v.* R. Co. 8 Eng. L. & Eq. 362; Hamlin *v.* R. Co., 1 H. & N. 408.

tinued, and that the railroad was, therefore, liable, independent of any contract, for falsely representing that a train would start when it knew it would not.

A Mississippi case[1] takes the other view. There the defendant ran a steamer for the carriage of the mails and passengers between New Orleans and Mobile, landing at intermediate points on the coast for passengers whenever he advertised to do so, and he advertised at Pascagoula that he would land at that place for passengers. Acting upon this notice, the plaintiff's wife and himself went during the night to the wharf to take passage on defendant's vessel, and remained there in waiting for it during the balance of the night, but the boat did not land, in consequence of which they were not only greatly disappointed, but, owing to the inclemency of the weather and the exposure, the plaintiff's wife was made sick. The excuse offered by the defendant for not making the landing according to his published notice, was, that owing to the low tide and stormy weather, the vessel could not have been landed without danger, and without causing a delay in the delivery of the mail at Mobile. It was held, however, that while these circumstances give rise to no special contract between the plaintiff and defendant, they did impose an obligation upon the latter, the disregard of which was a breach of duty, for which he could be sued in an action in tort; and that there being evidence of a willful and capricious failure to comply with the notice, from which the plaintiff and his wife were sufferers, and as no evidence whatsoever was given of any effort by the defendant to land his boat as he had advertised, the case was properly submitted to the jury, whose province it was to determine

[1] Herin v. McCaughan, 32 Miss. 17; 66 Am. Dec. 588.

whether there had been such willful neglect of duty as to warrant exemplary damages.

The cases just cited, are the only ones where the question is presented in the form of an offer and an implied acceptance by the intending passenger presenting himself at the place appointed in the offer. The cases, however, where the contract has been made by the purchase of the ticket, and the carrier fails to perform the conditions in the time-table or advertisement show the true doctrine.

§ 238. **Offer turned into Contract by Purchase of Ticket.**—In *Gordon* v. *Manchester Railroad Company*,[1] the plaintiff had purchased a ticket to be carried (according to the time-tables), from a way station to the terminus of the road, but the train did not stop for him, for the reason that it was unexepectedly overcrowded, and upon an up grade, which in its loaded condition would have made it very difficult to start again if it had stopped at the station. He brought an action against the company, but it was held that the published time-tables of the company imposed upon it no further obligation than to use due care and diligence, to be punctual in its departures and arrivals, and in the carrying of its passengers according to such tables, and that the failure in this instance to carry the plaintiff as he had been led by them to expect, not being attributable to the negligence of the company, he could not recover. The court very properly reasoned that if a railroad was an insurer of punctuality it would be under a higher obligation to run punctually than to run safely; and that as to safety, carriers of passengers are bound only to use care and skill, it

1 52 N. H. 596, 13 Am. Rep. 97, and see Reed *v.* R. Co., 59 N. W. Rep. 144 (Mich.).

would be absurd and against public policy to make them guarantors against loss of time at the expense of safety of life and limb.[1]

In *Sears* v. *Eastern Railroad Company*,[2] a railroad company delayed the departure of its train for about two hours after its advertised time, for the accommodation of a number of its patrons who wished to attend a performance at the theatre, and to be carried home after it was over, and a ticket holder who went to its depot to be carried at the advertised time, was allowed to recover from the company his expenses in being carried to his destination in a hired conveyance. This case must be regarded as determining the true *status* of tickets and time-tables. The ticket, the court held, was a contract, the terms of which were to be found not only in its printed terms, but in the public advertisement of the times when the trains would run, which entered into and became a part of the contract. But the promise as to the running of trains was not irrevocable. Railroads find it necessary to vary the terms of running their trains, and they have a right to make these variations even as against those who have purchased tickets. The contract entered into between carrier and customer by the publication of time-tables and the purchase of a ticket, is subject to an implied condition that the carrier may, after reasonable notice, change its promise in this respect, but the notice of the change to be sufficient, must be either actually

[1] Another reason given by the court was scarcely as sound. "In this country," it was said, "nearly all railroads publish time tables, and delays not attributable to negligence are not uncommon; yet suits to recover damages for detention in such cases are almost, if not quite, unknown. That such actions are almost unprecedented, shows very strongly what has been understood to be the law upon the subject." It is submitted that it shows nothing of the kind; it shows that people prefer to waive their legal rights rather than elect to enforce them with all the trouble and expense of a law suit against powerful corporations.

[2] 4 Allen, 433; and see Savannah etc. R. Co., *v.* Bonaud, 58 Ga. 180.

brought to the passenger himself, or it must be published as extensively as the original advertisement was. And as it appeared that the plaintiff had read the time-table in the city newspapers, and no notice of the change had been published there, the fact that such notice had been posted up in the station and in the cars, did not affect him, it not being shown that he had actual notice of the change. "If they had published a notice of the change in the newspaper we think he would have been bound by it. For as they have a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made."

The court in the Sears Case said that "if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he (the passenger) would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from this source." So, in *Hurst* v. *Great West. R. Co.*,[1] the time-table which the plaintiff relied on contained a clause that the company did not warrant that the trains would arrive punctually, and the court said: "If there was any contract here, it would appear from the time bills published by the company; and if the plaintiff (whose duty it was to do so) had put in the time bill we would have seen what the real contract was, viz.: that the company do not warrant that their trains shall arrive with punctuality at the time indicated at the different stations."[2]

§ 239. **Liability for not Running According to Time Table.**—From the foregoing authorities, the law of America, on this subject, may be thus stated:

[1] 19 C. B. (N. S.) 310.

[2] And see Hawcroft *v.* R. Co., *supra*.

1. That the publication of the times and places at which trains leave and arrive are offers which become contracts upon their acceptance by any person presenting himself as an intending passenger relying on such published proposal.

2. That such offer is not unconditional, but is subject to the implied conditions (*a*) that if performance shall become impossible without the carrier's fault, he shall be excused, and *(b)* that he shall have the right to change its terms upon giving reasonable notice of such change.

3. That such notice of change, if given in the same manner as the original offer was made, need not be brought home to the passenger, but if given in a different manner it must be.

4. That the contract entered into by the purchase of a ticket is subject both to the statements made in the published time-tables and to the implied conditions, 2 *(a)* and *(b)*.

5. That the carrier may qualify his liability by giving notice in his time-tables that he does not warrant that his trains shall arrive and depart at the precise times indicated, though such a limitation would not be construed to cover a breach which resulted from his gross negligence.

§ 240. **Tickets as Contracts.**—A ticket, whether issued by a railroad, a ship or any other kind of carrier, and which entitles the one to whom it is sold, or the holder, to be carried a certain distance, has not the contract effect of the bill of lading of goods. The reason is that it is but a voucher whose office is to enable the servants of the carrier to recognize the holder as entitled to be carried on its trains or ves-

sels.[1] "Where a person purchases a ticket, he does not expect that thereby he is making a contract limiting the liability of the railroad, but simply that he is receiving a check showing that the fare has been paid over the line to the place of destination, wherever that may be."[2]

Suppose A is starting on a journey from X to Y. He goes to the ticket office at X, and says: Give me a ticket to Y. The ticket is taken from the pigeon hole by the ticket seller, and as A places the money on the counter the ticket is handed to him. Or before asking for a ticket, he may inquire the rate of fare to Y, after learning which he puts before the ticket agent the money and his ticket is handed to him with the change, if he has not tendered the exact amount. This is the customary mode of contracting for passage by train or boat in all parts of the United States. Now, it is obvious that the very instant the ticket agent takes possession of the money tendered, the contract to carry A from X to Y is complete. The ticket is not the contract to carry, but is issued for the purpose of satisfying the servants of the carrier in charge of the conveyances that A has a right to be carried from X to Y, and it is for the carrier's benefit, who would otherwise have to notify all his agents and servants engaged in the transportation that he had contracted to carry A from X to Y.[3] Suppose A, as he is upon his journey,

1 Nevins *v.* Bay State Steamboat Co., 4 Bosw. 225; Rawson *v.* R. Co., 48 N. Y. 212; 8 Am. Rep. 543; Brown *v.* R. Co., 11 Cush. 97; Malone *v.* R. Co., 12 Gray, 388; 74 Am. Dec. 598; Quimby *v.* Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 469; Wilson *v.* R. Co., 21 Gratt. 654; Burnham *v.* R. Co., 63 Me. 298; 18 Am. Rep. 220; Kent *v.* R. Co., 45 Ohio St. 284; 4 Am. St. Rep. 539; 12 N. E. Rep. 798; Kerr *v.* Liverpool etc. Mav. Co., 12 Week. Dig. 164; Logan *v.* R. Co., 77 Mo. 666; Balt. etc. R. Co. *v.* Campbell, 36 Ohio St. 647; Frank *v.* Ingalls, 41 Ohio St. 560; Logan *v.* R. Co., 77 Mo. 666; Verner *v.* Switzer, 32 Pa. St. 208; Mich. Cent. R. Co. *v.* Harris, 12 Wall. 65.

2 Mauritz *v.* R. Co., 23 Fed. Rep. 765.

3 In the leading English case of Henderson, *v.* Stevenson, L. R. 2 Sch. & Div. 470, overruling Zunz *v.* R. Co., L. R. 4 Q. B. 539 (1869), Lord Chelmsford said: "Assent is a question of evidence, and the assent must be given before the comple-

finds a notice on his ticket limiting the liability of the carrier, or requiring the passenger to perform certain conditions, is he bound by them? Certainly not, for as they were no part of the contract he made, they are of no binding force, and he may simply disregard them.[1]

tion of the contract. The company undertake to carry passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage money, the ticket being only a voucher that the money has been paid. Or if a ticket is necessary to bind the company, the moment it is delivered the contract is completed before the passenger has had an opportunity of reading the ticket, much less the indorsement." Lord Hatherly concurred. "I agree," said he, "with the observation that was made by my noble and learned friend, Lord Chelmsford, that the money having been paid, and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A ticket is in reality in itself nothing more than a receipt for the money which has been paid."

In Burke *v.* R. Co., L. R. 5 C. P. Div. 1 a ticket, issued by a railroad company in England for a journey from London to Paris, was in the form of a small book of coupons, enclosed in a paper cover, and the paper cover contained printed matter. The Court held, that the contract was contained in the whole book, including the cover, and that the English company were protected by a condition printed on the inside or page two of the cover, and exempting them from liability for damage incurred on the French railroad, although the passenger had not read or noticed the condition. The case was distinguished from Henderson *v.* Stevenson on the ground that the form of the ticket showed the passenger that it was not a mere voucher, but the contract which the company offered to make with him.

A distinction is taken in a New York case between ordinary steamboat tickets and ocean steamship tickets, for the reason that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or freight. Steers *v.* Liverpool etc. Steam Co., 51 N. Y. 1. This distinction is, however, rejected in a case in the Federal court except as to regulations which the carrier has a right to make. The Majestic, 60 Fed. Rep. 624.

[1] Malone *v.* R. Co., 12 Gray 388; 74 Am. Dec. 598; Brown *v.* R. Co., 11 Cush. 97; Henderson *v.* Stevenson, L. R. 2 Sc. & Div. Cas. 470; criticising Zunz *v.* R. Co., L. R. 4 Q. B. 544; Baltimore etc. R. Co. *v.* Campbell, 36 Ohio St. 647; 38 Am. Rep. 617; Kent *v.* R. Co., 45 Ohio St. 284; 4 Am. St. Rep. 539; 12 N. E. Rep. 798; Kansas etc. R. Co. *v.* Rodenbaugh, 38 Kas. 45; 5 Am. St. Rep. 715; 15 Pac. Rep. 899; Mauritz *v.* R. Co. 23 Fed. Rep. 765. "It would be unreasonable to presume that a passenger, when he buys a railroad ticket at a ticket office, stops to read the language printed on it, and it would be equally unreasonable to hold that a passenger must take notice that the language upon his ticket contains any contract or in any way limits the carrier's common law liability. * * The contract between these parties was made when the plaintiff bought her ticket and the rights and duties of the parties were then determined. Hence, even if the plaintiff had read what appears upon her ticket after she had entered upon her journey, it would have made no difference with her rights. She was not then obliged to submit to a contract which she never made or leave the train and demand her baggage." Rawson *v.* R. Co., 48 N. Y. 212.

If the passenger is notified at the time of the purchase of the ticket that he must sign it, this is notice to him that it is a contract, and not a mere voucher, so that if he does sign it, he will be bound by all its legal conditions, even though he does not read them.[1] And if the ticket is a "free pass," or one issued without consideration, its acceptance by the passenger constitutes a contract between him and the carrier with all the legal conditions it may contain. The reason is that one may well presume that a gratuity is not likely to be conferred except with some limitations, which it is the duty of the recipient to acquaint himself with.[2] So, in the case of an absolutely free pass—a gratuity—the passenger would be bound by the condition on the principle that he who accepts a gift must accept also the conditions on which it is given.[3]

And there are certain regulations of the carrier which the latter has a right to make for the protection of the public as well as his own, which are binding on all persons as soon as they are published, and whether they are known to the passenger or not. As well said in a Missouri case: "A railroad operated at random, without fixed rules and regulations to be observed in its management, would be a nuisance and

1 Bethea *v.* R. Co., 26 S. C. 91; 1 S. E. Rep. 372.

2 Wells *v.* R. Co., 24 N. Y. 181; 26 Barb. 641; Smith *v.* R. Co., 24 N. Y. 222; Perkins *v.* R. Co., 24 N. Y. 196; Gulf etc. R. Co. *v.* McGowan, 65 Tex. 640; Hall *v.* R. Co., L. R. 10 Q. B. 437.

3 Quimby *v.* R. Co., 23 N. E. Rep. 205 (Mass.). On this principle of the acceptance of a gift and not the making of a contract the condition was held to be binding on an infant in Griswold *v.* R. Co., 53 Conn. 371; 55 Am. Rep. 115. In Rogers *v.* Kennebec Steamboat Co., 29 Atl. Rep. 1069 (Me.) the plaintiff was riding on a free pass with a friend who had obtained it for herself "and two ladies." The plaintiff at the time of the injury had not seen the pass, but knew of it and was availing herself of it. She was held bound by its conditions, the court saying: "She knew that it was a mere gratuity and she had an opportunity to ascertain if any conditions were attached to the gift. Her omission to inform herself of its terms could give her no additional rights. The acceptance of a conditional gift necessarily involves a compliance with the conditions." Muldoon *v.* R. Co. 38 Pac. Rep. 995 (Wash.).

terror to the country through which it might pass. The probability that innumerable accidents and injuries would result from such a reckless mode of moving trains, requires the adoption and strict enforcement of reasonable regulations for their operation and management."[1]

§ 241. **Ticket Good for Continuous Trip.**—The contract of carriage from one place to another is an entire contract, and the passenger has no right to demand that the carrier shall allow him to go a portion of the journey at one time, and another portion at another. The ticket, for example, is for a trip from A to C. The passenger cannot claim to be carried to B, an intermediate station, and afterwards from B to C.[2] Though the holder of a coupon ticket over connecting lines is not bound to make a continuous journey from his starting point to his destination, he is obliged to make a continuous journey between each of two points named on a coupon.[3]

But where a passenger on a train which does not

[1] Logan *v.* R. Co., 77 Mo. 663. As to regulations of this kind see *post.*

[2] Stone *v.* R. Co., 47 Iowa, 82; 29 Am. Rep. 458; Hamilton *v.* R. Co., 51 N. Y. 100; Chaney *v.* R. Co., 11 Met. 121; 45 Am. Dec. 190; Cleveland etc. R. Co. *v.* Bartram, 11 Ohio St. 457; State *v.* Overton, 24 N. J. 435; 61 Am. Dec. 671; Johnson *v.* R. Co., 46 N. H. 213; 88 Am. Dec. 199; Beebe *v.* Ayres, 28 Barb. 275; Drew *v.* R. Co., 51 Cal. 425; Briggs *v.* R. Co., 24 U. C. Q. B. 510; Craig *v.* R. Co., 24 U. C. Q. B. 504; Barker *v.* Coffin, 31 Barb. 556; Breen *v.* R. Co., 50 Tex. 43; Gale *v.* R. Co., 7 Hun. 670; Oil Creek etc. R Co. *v.* Clark, 72 Pa. St. 231; Terry *v.* R. Co., 13 Hun. 359; Dunphy *v.* R. Co., 10 Jones & S. 128; Dietrich *v.* R. Co., 71 Pa. St. 432; 10 Am. Rep. 711; Vanklrk *v.* R. Co., 76 Pa. St. 66; 18 Am. Rep. 404; Hatton *v.* R. Co., 39 Ohio St. 375; Johnson *v.* R. Co., 63 Md. 106; Roberts *v.* Koehler, 30 Fed Rep. 94; Wyman *v.* R. Co., 34 Minn. 210; Walker *v.* R. Co., 15 Mo. (App.) 333; aliter by statute in Maine. Carpenter *v.* R. Co., 72 Me. 388. A conductor's check is evidence only that fare has been paid for a continuous journey. State *v.* Overton, 24 N. J. L. 435; 61 Am. Dec. 671; Cheney *v.* R. Co., 11 Met. 121; 45 Am. Dec. 190; McClure *v.* R. Co., 34 Md. 532; 6 Am. Rep. 345; Walker *v.* R. Co., 15 Mo. App. 333. By statute in California this is allowed to passengers and where a railroad maintains several depots in a city, each depot is an "intermediate station," within the meaning of the statute. Robinson *v.* R. Co., 38 Pac. Rep. 94, 722.

[3] Little Rock etc. R. Co. *v.* Dean, 43 Ark. 529; 51 Am. Rep. 584; Brooke *v.* R. Co., 15 Mich. 332; Palmer *v.* R. Co., 3 S. C. 580.

stop at C is allowed to ride to B, he is entitled to travel on a proper train from B to C on the same ticket.[1] And the passenger may alight at places where the vehicle stops, and resume his journey on the same.[2] And he has a right to ride to a station if the train stops there, short of his destination by the terms of the ticket.[3]

The sale of a ticket before the departure of a train, or before the passengers are permitted to enter it, is not a representation that the train will stop at the place to which the ticket is sold,[4] or that it will wait until the passenger can board it, beyond its schedule time for leaving.[5] A ticket marked "good on passenger trains only," does not imply that all the passenger trains of the railroad company issuing it will stop at the station designated on it.[6] Nor is the punching or taking up of a ticket by a conductor, after he has informed a passenger that the train will not stop at a station, an agreement that it will.[7]

Nor does a ticket from A to C give any right to be carried from C to A.[8] Nor does a ticket from A to C give a right to travel in a roundabout way, but only in the usual and most direct route from A to C.[9]

1 Kellett *v.* R. Co., 22 Mo. (App.) 356.

2 Dice *v.* Willamette Trans. Co., 8 Oreg. 60;

3 Wheel. Carr. 148 criticising Johnson *v.* R. Co., 63 Md. 106; see Richmond etc. R. Co. *v.* Ashley, 79 Va. 130; 52 Am. Rep. 620.

4 Duling *v.* R. Co., 66 Md. 120; Pitts. etc. R. Co. *v.* Nuzum, 50 Ind. 141; 19 Am. Rep. 703; Ohio etc. R. Co. *v.* Swarthout, 67 Ind. 567; Int. etc. R. Co. *v.* Hassell, 62 Tex. 256; 50 Am. Rep. 525. See Mobile etc. R. Co. *v.* McArthur, 43 Miss. 180.

5 Paulitsch *v.* R. Co., 102 N. Y. 280; 6 N. E. Rep. 577.

6 Ohio etc. R. Co. *v.* Swarthout, 67 Ind. 567; 33 Am. Rep. 104.

7 Trotlinger *v.* R. Co., 11 Lea. 353.

8 Keeley *v.* R. Co., 67 Me. 163; 24 Am. Rep. 19; Coleman *v.* R. Co., 106 Mass. 160.

9 Bennett *v.* R. Co., 69 N. Y. 507; 25 Am. Rep. 250; Church *v.* R. Co., 60 N. W. Rep. 854 (S. D). Under the code of California, which empowers the purchaser of a railroad ticket to ride from the station at which the ticket was bought to the station of destination, "and from any intermediate station to the station of destination," at any time within six months after the purchase of the ticket, the right of a passenger to stop at an intermediate station, and resume his journey, is not affected by the fact that the ticket bought by him gave him the choice of two different routes, and he selected the longer route. Robinson *v.* R. Co., 38 Pac. Rep. 722, 94.

§ 242. **Limitations as to Time.**—As a general rule, a ticket is good until used.[1] The contract of carriage may, however, be limited as to time, as is frequently done by placing in the ticket a condition that it shall not be good for passage after the expiration of a prescribed time. Such conditions, if brought home to the passenger so as to be a part of his contract with the carrier, are valid,[2] and they are reasonable because in no other way can the carrier protect himself from overcrowding, or be able to anticipate the number of passengers he will be required to provide for at a given time.[3] A commutation-ticket, good for a certain number of miles, but limited to a certain time, is worthless after that time, although the number of miles have not been traveled.[4] A ticket worthless for this reason is not validated because other persons with similar tickets have been allowed to travel without objection,[5] or because it has been punched by a baggage-man,[6] or recognized by one of several conductors.[7] Where a ticket is required to be "used" by a certain day, the passenger need not have completed his journey by that date, it is sufficient that he has commenced it.[8] A ticket "good this trip only," entitles the passenger to

1 Penn. R. Co. *v.* Spicker, 105 Pa. St. 142.

2 Hill *v.* R. Co., 63 N. Y. 101; Farewell *v.* R. Co., 15 U. C. C. P. 427; Elmore *v.* Sands, 54 N. Y. 512; 13 Am. Rep. 617; Barker *v.* Collin, 31 Barb. 556; Boice *v.* R. Co., 61 Barb. 611; Boston etc. R. Co. *v.* Proctor, 1 Allen 267; 79 Am. Dec. 729; Shedd *v.* R. Co., 40 Vt. 88; State *v.* Campbell, 32 N. J. L. 309; Wentz *v.* R. Co., 5 Thomp. & C. 556; 3 Hun. 241; Nelson *v.* R. Co., 7 Hun. 140; Briggs *v.* R. Co., 24 U. C. Q. B. 510; Pennington *v.* R. Co., 62 Md. 95; Johnson *v.* R. Co., 46 N. H. 213; 88 Am. Dec. 199; Ramtzy *v.* R. Co., 40 La. Ann. 47. Alter by statute in Maine, Dryden *v.* R. Co., 60 Me. 512.

3 Barker *v.* Collin, 31 Barb. 556.

4 Powell *v.* R. Co., 25 Ohio St. 70; Sherman *v.* R. Co., 40 Iowa 45; Lillis *v.* R. Co., 64 Mo. 462; 27 Am. Rep. 255; Hall *v.* R. Co., 9 Fed. Rep. 585.

5 Oppenheimer *v.* R. Co., 9 Colo. 320; 12 Pac. Rep. 217.

6 Wentz *v.* R. Co., 3 Hun. 241; 5 Thomp. & C. 556.

7 Dietrich *v.* R. Co., 71 Pa. St. 432; 10 Am. Rep. 711; Sherman *v.* R. Co., 40 Iowa 45; Wakefield *v.* R. Co., 117 Mass. 544; Johnson *v.* R. Co., 46 N. H. 213; 88 Am. Dec. 199; Hill *v.* R. Co., 63 N. Y. 101; Nolan *v.* R. Co., 9 Jones & S. 541; Stone *v.* R. Co., 47 Iowa 82; 29 Am. Rep. 458; Keeley *v.* R. Co., 67 Me. 163.

8 Lundy *v.* R. Co., 66 Cal. 191; 56 Am. Rep. 100; Auerbach *v.* R. Co., 89 N. Y. 281; 42 Am. Rep. 290; Evans *v.* R. Co., 11 Mo. App. 463.

use it once on any day, the words relating not to time, but to a journey.[1]

§ 243. **Assignability of Ticket.**—A ticket is ordinarily transferable,[2] but a condition in a ticket that it shall not be transferred, is good.[3] One who rides on such a ticket with the knowledge of the carrier, is, nevertheless, a passenger.[4]

§ 244. **Ticket Conclusive of Passenger's Rights.**—The ticket, as between conductor and passenger, is conclusive evidence of the right of the passenger to travel, and the former is not obliged to take the passenger's word, or accept his statements that he has paid the proper fare to the proper officer,[5] where the passenger has lost or forgotten his ticket;[6] or has been given the wrong ticket by the ticket agent, or a ticket which does not entitle him to the passage claimed by him;[7] or where a former conductor has taken up his ticket and given him no voucher to present to the second conductor;[8] or a wrong voucher;[9] or has punched it as used over the whole line;[10] or the ticket has on its face expired, but the passenger claims it was owing to the fault of the carrier;[11] or the conditions

1 Pier *v.* Finch, 24 Barb. 514.

2 Hudson *v.* R. Co., 3 McCrary, 249.

3 Post *v.* R. Co., 14 Neb., 110; 45 Am. Rep. 100; 15 N. W. Rep. 225; Cody *v.* R. Co., 4 Sawy. 114; Freidenrich *v.* R. Co., 53 Md. 201.

4 Robostelli *v.* R. Co. 33 Fed. Rep. 796.

5 Petrie *v.* R. Co., 42 N. J. (L.) 449; Mosher *v.* R. Co., 23 Fed. Rep. 326; Hall *v.* R. Co., 15 Fed. Rep. 57; Atchison etc. R. Co. *v.* Gants, 38 Kas. 618; 17 Pac. Rep. 54; Weaver *v.* R. Co., 3 Th. & C. 270; Mckay *v.* R. Co., 34 W. Va. 65; 11 S. E. Rep. 737; Rose *v.* R. Co., 106 N. C. 168; 11 S. E. Rep. 526; Louisville etc. R. Co. *v.* Fleming, 14 Lea 128.

6 Thomp. Carr., Pass. 338; Downs *v.* R. Co., 36 Conn. 287; 4 Am. Rep. 77; Jerome *v.* Smith, 48 Vt. 230.

7 Peabody *v.* R. Co., 26 Atl. Rep. 1 53 (Or.); Frederick *v.* R. Co., 37 Mich. 342; Chicago etc. R. Co. *v.* Griffin, 68 Ill. 499; Penn. R. Co. *v.* Connell, 112 Pa. St. 295; Mckay *v.* R. Co., 34 W. Va. 65; 11 S. E. Rep. 737.

8 Townsend *v.* R. Co., 56 N. Y. 295; 15 Am. Rep. 419; Shelton *v.* R. Co., 29 Ohio St. 214.

9 Bradshaw *v.* R. Co., 135 Mass. 407; 46 Am. Rep., 481; McClure *v.* R Co., 34 Md. 532; 6 Am. Rep. 345; Yorton *v.* R. Co. 54 Wis. 234; 41 Am. Rep. 23; 11 N. W. Rep. 482.

10 Phila. etc. R. Co. *v.* Rice, 64 Md. 63.

11 Penn. Co. *v.* Hine, 41 Ohio St. 276; *contra.* Little Rock etc. R. Co. *v.* Dean, 43 Ark. 529; 51 Am. Rep. 584.

of the ticket require that the passenger shall be identified by a certain person or the ticket stamped at a certain station, and the passenger explains that he could find no agent there.[1]

He must pay his fare, or he will be rightly ejected, and the carrier cannot be made liable for the act of the conductor in so ejecting him, but the remedy of the passenger is on the breach of the contract of carriage, or upon the neglect or mistake of the former servant. The conductor of a train or car, it is said, cannot be required to take the word of a passenger that he has paid his fare though he has no ticket. He should not be called upon to decide the correctness of the passenger's story. A wrong decision in favor of the passenger would leave the carrier without remedy for the fare, for the passenger disappears at the end of the trip, and even if he does not, the carrier would find it impossible to prove that a particular passenger had not purchased a ticket at one of his numerous stations. A wrong decision against the passenger, on the other hand, would subject the carrier to the liability of a trespasser, the effect of which would be that the carrier would be obliged either to carry every person who claimed to have obtained a right to do so, and thus submit to numerous frauds—every lawless person possessing sufficient recklessness having him at a disadvantage—or make such stringent rules to protect himself as would greatly incommode the public.

The cases where the passenger has been held in the wrong in insisting on riding upon a ticket which does not call for the transportation he claims, are where, though a contract has been made for a particular trip,

[1] Mosher *v.* R. Co., 17 Fed. Rep. 880; 26 S. C. 91; 1 S. E. Rep. 372; Taylor *v.* R. Co., 99 N. C. 185; 6 Am. St. Rep. 509; 5 S. E. Rep. 755. 26 *Id.* 326; 127 U. S. 390; Cloud *v.* R. Co., 14 Mo. (App.) 136; see Bethea *v.* R. Co.,

the passenger has inadvertently received, through the error of the carrier's servant, a voucher entitling him to something else or to nothing, or he has been deprived of his voucher by the mistake of some servant of the carrier. Therefore, if the ticket on its face is a good one for the passage claimed, the conductor cannot lawfully refuse it, and the carrier will be liable for the ejection of the pasenger who refuses to pay his fare again, though the conductor act according to the carrier's instructions to him. This is only equivalent to saying that the ticket is conclusive evidence of the passenger's right to travel as between conductor and passenger.[1] In a Massachusetts case,[2] the carrier's agent sold the plaintiff a ticket good from A to B, and the passenger, on noticing some holes punched in it, inquired of him what they meant, and the agent assured the passenger that they made no difference, but that the ticket was all right. The conductor, acting under his orders as to tickets so punched, refused to receive it, and ejected the passenger. It was held that the railroad was liable for the ejection.[3] Where a

1 Hufford *v.* R. Co., 53 Mich. 118; 64 Mich. 631; Phila. etc. R. Co. *v.* Rice, 64 Md. 63; Toledo etc. R. Co. *v.* McDonough, 53 Ind. 289; Lake Erie etc. R. Co. *v.* Fix, 88 Ind. 381; 45 Am. Rep. 464 (where this distinction is recognized and followed); Pitts. etc. R. Co. *v* Hennigh, 39 Ind. 509; Palmer *v.* R. Co., 3 S. C. 580; 16 Am. Rep. 750; Burnham *v.* R. Co., 63 Me. 298; 18 Am. Rep. 220; Chicago etc. R. Co. *v.* Bannerman, 15 Ill. (App.) 100; Johnson *v.* R. Co., 46 Fed. Rep. 347; McGinness *v.* R. Co.. 21 Mo. (App.) 397; McMahon *v.* R. Co., 47 N. Y. (S. C.) 282; Maroney *v.* R. Co., 106 Mass. 153; Sheets *v.* R. Co., 20 S. E. Rep. 566 (W. Va).

2 Murdoch *v.* R. Co., 137 Mass. 293; 50 Am. Rep. 307.

3 "If," said the Court, "when the conductor refused to accept the punched ticket, it had appeared on an inspection of it that there had been a mistake, and that it did not on its face purport to be good for a passage over that part of the defendant's road, and that the ticket-seller had dellvered to the plaintiff a good ticket upon some other railroad, or to some place which had already been passed, when the mistake was discovered, and it was found that the plaintiff had through inadvertence accepted a ticket which on its face was plainly insufficient, then this case would have fallen within the doctrine of the recent decision in Bradshaw *v.* South Boston Railroad, 135 Mass. 407; s. c., 46 Am. Rep. 481, and it would have been the duty of the plaintiff to yield for the time being, and pay his fare anew, or withdraw from the car. * * * But in the present case, such is not the posi-

passenger paid his fare on a street car from which he was transferred to another to complete the journey and the second conductor ejected him for refusing to pay again, the carrier was held liable.[1]

§ 245. **Limiting Liability for Negligence—as to Paying Passengers.** —The American rule[2] applies to carriers of passengers as well as of goods, and therefore, a carrier of a passenger, who has paid a consideration for his passage, cannot exempt himself from liability for damages caused by the negligence of himself, or that of his agents or servants, by any contract which he may have induced his customer to approve, such an agreement being against public policy.[3]

§ 246. **Duty Toward Free and Paying Passenger the Same.**—There is no difference as to the de-

tion of the parties. As has been seen, the plaintiff not only was not guilty of any negligence in accepting his ticket, but he examined it carefully, saw everything there was on it, and received explanations of the meaning of the punched holes, and assurances that the two tickets, in the condition in which they were, would be good for the trip. In such a case, there being no mistake or inadvertence on his part in the respects mentioned, and the tickets which were delivered being in all particulars such as were intended to be delivered, and there being nothing which could be gathered by inspection to show that they were insufficient, and no notice of their insufficiency being given to the plaintiff by any body, or in any form, until he had already entered upon and partially accomplished his journey over the defendant's road, he might well insist upon being allowed to complete that journey. If the defendant's superintendent or president or both of them, had been standing by when the plaintiff purchased his tickets, and had heard and assented to what was said by the ticket-seller, and if they also were under the same mistake as to the rules established for the guidance of conductors, the legal position of the plaintiff would hardly have been stronger than it is at present. It would still be the case that he took his tickets relying on the mistaken assurances of the defendant's agent in respect to their validity. If the defendant through any imperfection in its rules or methods, or any ignorance or violation of rules or instructions by its agents, has been led into any interference with the rights of the plaintiff under such circumstances, it must abide the consequences. To hold the contrary would be a burden upon passengers such as is called for by no reason of necessity or expediency."

1 Hamilton *v.* R. Co., 53 N. Y. 25.

2 See *ante*, § 137.

3 Railroad Co. *v.* Lockwood, 17 Wall. 357; Ohio etc. R. Co. *v.* Selby, 47 Ind. 471; Com. *v.* R. Co., 108 Mass. 7; 11 Am. Rep. 301; Jones *v.* R. Co., 28 S. W. Rep. 883 (Mo.); Tibby *v.* R. Co., 82 Mo. 300. And see the cases arranged by States cited in § 137.

gree of care required of a carrier where one is riding free with the carrier's consent, and where he has paid his fare. Herein we see a distinction between the bailee of goods, whether he be an ordinary bailee or a common carrier, and the carrier of passengers. Because the bailor, where the bailment is for the bailor's sole benefit, has all the benefit, the law requires him to run all the risk except that of the fraud or the gross negligence amounting to fraud of the bailee.[1] Because the extraordinary liability of the carrier of goods is founded on his reward,[2] where that reward is wanting, the law does not hold him as an insurer. But public policy has required another rule where the lives and limbs of human beings are the subject-matter of the undertaking. "When," say the Supreme Court of the United States, "carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'"[3]

§ 247. **Who are Free Passengers.**—It does not take the payment of, or the obligation to pay fare, to make one a paying passenger. Any legal considera-

1 See *ante*, § 33.

2 See *ante*, § 142.

3 Phila. etc. R. Co., *v.* Derby, 14 How. 468; The New World *v.* King, 16 How. 469; Flint etc. R. Co. *v.* Weir, 37 Mich. 111; 26 Am. Rep. 499; Fay *v.* The New World, 1 Cal. 348; Gordon *v.* R. Co. 40 Barb. 546; Indiana R. Co. *v.* Mundy, 21 Ind. 48; 83 Am. Dec. 339; Ohio etc. R. Co. *v.* Muhling, 30 Ill. 9; 81 Am. Dec. 336; Illinois Cent. R. Co. *v.* Read, 37 Ill. 484; 87 Am. Dec. 260; Perkins *v.* R. Co. 24 N. Y. 196; 82 Am. Dec. 281; Flinn *v.* R. Co., 1 Houst. 469; Todd *v.* R. Co. 3 Allen, 18; 80 Am. Dec. 49; 7 Allen, 207; Lemon *v.* Chanslor, 68 Mo. 340; 30 Am. Rep. 799; Gillenwater *v.* R. Co., 5 Ind. 339; 61 Am. Dec. 101; Ohio etc. R. Co. *v.* Nickless, 71 Ind. 271; Waterbury *v.* R. Co., 17 Fed. Rep. 674; Rice *v.* R. Co., 22 Ill. (App.) 643; State *v.* R. Co. 63 Md. 433.

tion—any benefit to the carrier or detriment to the passenger[1]—is enough.[2] One is not a free passenger who is given a drover's ticket, called a free pass, to travel with his stock, for the price he pays for the carriage of the cattle, or the care which he is to take of them on the journey, furnishes a consideration for the transportation of himself.[3] Nor one who is an express messenger riding free, in charge of the express matter under a contract between the railroad and the express company, for the railroad receives its compensation from the incidental benefits of the contract of carriage of the express matter.[4] Nor one who has been invited by the officers of a railroad to arrange concerning the use of an invention of his by the railroad, the latter to pay his expenses, and furnish him a "free pass" to their city, for the pass was part of the consideration inducing the plaintiff to take the journey.[5] Nor one to whom a pass has been given as part consideration for the leasing by his employer of a pleasure resort, owned by the carrier.[6]

[1] See Lawson, Contr., Cap. IV. Consideration.

[2] It is held, however, in New York that one traveling upon a pass good for free passage in the ordinary cars of the railroad company, does not by paying extra for transportation in a drawing-room car, become a passenger for hire. Ulrich *v.* R. Co., 108 N. Y. 80; 2 Am. St. Rep. 369; 15 N. E. Rep. 60.

[3] Railroad Co. *v.* Lockwood, 17 Wall. 357; Cleveland etc. R. Co. *v.* Curran, 19 Ohio St. 1; 2 Am. Rep. 362; Cincinnati etc. R. Co. *v.* Pontius, 19 Ohio St. 221; Knowlton *v.* R. Co., 19 Ohio St. 260; 2 Am. Rep. 395; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526; Golde *v.* R. Co., 30 Pa. St. 242; 72 Am. Dec. 703; Flinn *v.* R. Co., 1 Houst. 469; Ohio etc. R. Co. *v.* Selby, 47 Ind. 471; 17 Am. Rep. 719; Maslin *v.* R. Co., 14 W. Va. 180; 35 Am. Rep. 748; Railroad Co. *v.* Beaver, 41 Ind. 493; Litile Rock etc. R. Co. *v.* Miles, 40 Ark. 298; 48 Am. Rep. 10; Carroll *v.* R. Co., 88 Mo. 239; 57 Am. Rep. 382; Mo. Pac. R. Co. *v.* Ivey, 9 S. W. Rep. 346; Lawson *v.* R. Co., 64 Wis. 447; 54 Am. Rep. 634; Ohio etc. R. Co. *v.* Nickless, 71 Ind. 271; Tibby *v.* R. Co., 82 Mo. 272. An action for personal injuries sustained by the owner of horses while traveling with them on a drover's pass is not barred by a judgment for the injury the horses received in the same accident. Watson *v.* R. Co., 27 S. W. Rep. 924 (Tex.)

[4] Blair *v.* R. Co., 66 N. Y. 313; 23 Am. Rep. 55; Kenney *v.* R. Co., 7 N. Y. (Supp.) 255; *contra*, Bates *v.* R. Co., 147 Mass. 255.

[5] Grand Trunk R. Co. *v.* Stevens, 95 U. S. 655.

[6] Camden etc. R. Co. *v.* Pasch, 7 Atl. Rep. 731.

And it does not matter that the person is described on the ticket, or in the contract as "riding free," or that the ticket is called a "free ticket," or a "free pass."[1]

§ 248. **Limiting Liability for Negligence—as to Free Passengers.**—But the following question is still an unsettled one, viz., whether in the case of a free passenger the carrier should not be permitted to throw upon him all the risks of the journey, in consideration of the gratuitous service rendered him. In Alabama,[2] Iowa,[3] Minnesota,[4] Missouri,[5] Pennsylvania,[6] Texas,[7] and so far as it has been able to express an opinion, the Supreme Court of the United States,[8] the carrier cannot, even in such case, by any contract he may make with such a passenger, escape liability for the negligence of himself or his servants.

In Maine and Massachusetts and Washington, one

1 These expressions mean nothing more than that the holder is to be subjected to no *additional* charge, and that he is to pass free of the usual fare exacted of others. Cleveland etc. R. Co. *v.* Curran, 19 Ohio St. 1; 2 Am. Rep. 363; *contra*, Bissell *v.* R. Co., 25 N. Y. 442.

2 Mobile etc. R. Co. *v.* Hopkins, 41 Ala. 486; 94 Am. Dec. 607.

3 Rose *v.* R. Co., 39 Iowa, 246.

4 Jacobus *v.* R. Co., 20 Minn. 125; 18 Am. Rep. 360.

5 Bryan *v.* R. Co., 32 Mo. (App.) 228 (1888).

6 Buffalo etc. R. Co. *v.* O'Hara, 9 Am. & Eng. Corp. Cas. 321; Railroad Co. *v.* O'Hara, 12 Week Notes, 473; Penn. R. Co. *v.* Butler, 57 Pa. St. 335; Camden etc. R. Co. *v.* Pausch, 7 Atl. Rep. 731.

7 Gulf etc. R. Co. *v.* McGown, 65 Tex. 640.

8 Railroad Co. *v.* Lockwood, 17 Wall, 357, which was the case of a "drovers pass." The court held the plaintiff to be a passenger for hire and that an exemption on the ticket from liability for negligence was against public policy and void. But in the course of his able and elaborate judgment Mr. Justice Bradley said: "We do not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked with apparent confidence: 'May not men make their own contracts, or in other words, may not a man do what he will with his own?' The question at first sight seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by the public grant and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled."

who accepts a free pass as a pure gratuity on condition that he will assume all risk of personal injury, is bound by the condition, which is effectual to exonerate the carrier from liability for the negligence of his servants.[1] In Connecticut it is held that a condition in a free pass that the carrier shall not be liable for the negligence of his servants or otherwise, is valid and binding, and will protect the carrier from even the gross negligence of his servants.[2] And the same rule prevails in New Jersey,[3] and Louisiana.[4] In Illinois it is held that the exemption from liability in a free pass covers the negligence of the servants of the carrier, which is not gross or willful;[5] and the same ruling has been made in Indiana,[6] and Wisconsin.[7] New York, as in the case of the carriage of goods, considers any contract exempting the carrier from liability for the negligence of its servants, no matter of what degree, valid and binding, whether it be in a drover's pass or other so-called free ticket really issued for a consideration;[8] or an absolutely free ticket,[9] provided only the intention to include negligence is clearly expressed, and the negligence is not that of the corporation itself.[10]

1 Rogers *v.* Kennebeck Steam Co., 29 Atl. Rep. 1069 (Me.); Quimby *v.* R. Co., 23 N. W. Rep. 205 (Mass.); and see Bates *v.* R. Co. 147 Mass. 255; Muldoon *v.* R. Co., 35 Pac. Rep. 422; 38 Pac. Rep. 995 (Wash.).

2 Griswold *v.* R. Co., 53 Conn. 371; 55 Am. Rep. 115.

3 Kinney *v.* R. Co., 32 N. J. (L.) 407; 60 Am. Dec. 675; 34 N. J. (L.) 513; 3 Am. Rep. 265.

4 Higgins *v.* R. Co., 28 La. Ann. 133.

5 Arnold *v.* R. Co., 83 Ill. 273; 25 Am. Rep. 383; Ill. Cent. R. Co. *v.* Read, 37 Ill. 484.

6 Indiana Cent. R. Co. *v.* Mundy, 21 Ind. 48; 83 Am. Dec. 339.

7 Annas *v.* R. Co., 67 Wis. 46; 57 Am. Rep. 338.

8 Poucher *v.* R. Co., 49 N. Y. 263; 10 Am. Rep. 364; Smith *v.* R. Co., 29 Barb. 132; 24 N. Y. 222; Stinson *v.* R. Co., 32 N. Y. 333; 88 Am. Dec. 332; Boswell *v.* R. Co., 5 Bosw. 699; 10 Abb. Pr. 443.

9 Welles *v.* R. Co., 26 Barb. 641; 24 N. Y. 181; Perkins *v.* R. Co., 24 N. Y. 196; Ulrich *v.* R. Co., 108 N. Y. 80; 2 Am. St. Rep. 369; 15 N. E. Rep. 60.

10 In Smith *v.* R. Co., 29 Barb. 132, 24 N. Y. 222, a drover's pass contained the condition that the passenger rode free "at his own" risk of personal injury *from whatever cause*. The injury was caused on account of an old emigrant car, unsafe by reason of having a flat wheel, being attached to the train. The plaintiff had judgment for $5000, which on appeal to the Supreme Court was affirmed.

§ 249. **Arguments in Support of the Different Views.** — The courts of only fifteen States having passed upon the question in nearly half a century, it cannot be said that there is any rule which can be said

The contract did not expressly except negligence. Nor would the words "from whatever cause" be construed to include negligence. The case was then taken to the Court of Appeals, where the judgment below was affirmed by a divided court—five judges against three. Wright, J., held that the negligence was that of the corporation itself in furnishing an unsafe car; that the words in the pass "from whatever cause" did not include negligence; that plaintiff was not a gratuitous passenger and, therefore, the contract was clearly void. He also expressed the opinion that a contract which "would obviously enable the carrier to avoid the duties which the law enjoins as regard to the safety of men, encourage negligence and fraud, and take away the motive of self-interest on the part of such carrier which is perhaps the only one adequate to secure the highest degree of caution and vigilance," was contrary to public policy even where no fare was paid. Smith, J., agreed with Wright, J., on the first point. Denio and Davies, JJ., were of opinion that a contract exempting liability for negligence of agents or servants was valid as to a purely gratuitous passenger but not as to a paying passenger, which the plaintiff was. Sutherland, J. concurred in affirming the judgment on the ground that the contract for exemption for negligence was void, irrespective of the question whether the transportation was gratuitous or for hire. Selden, C. J., Allen and Gould, JJ., dissented. In Perkins *v.* R. Co., 24 N. Y. 196, the ticket was an absolutely free one by which the railroad was not to be liable under any circumstances, "whether of negligence of their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using this ticket." While going in defendant's cars from Rochester to Albany, he was killed in consequence of the breaking of a bridge. It was proved that the bridge was built of unsuitable materials negligently used by the trackmaster of the road in its construction. A judgment for plaintiff was reversed by the Court of Appeals, E. D. Smith, J., saying: "The contract makes no exceptions in respect to degree of negligence. It embraces all degrees. It uses the term negligence in its general generic sense. To hold that it does not embrace gross negligence is to interpolate into it a qualification not made by the parties, and which tends materially to impair and nullify its force, for the parties well knew that accidents were liable to result from the gross negligence of defendants' agents as well as from inferior negligence. The contract related to the acts of third persons, acting as agents of the defendants. Perkins agreed to take his risk in respect to the negligence of such third persons. He took it entirely. If the agents were guilty of criminal negligence, which is only another name for gross negligence when it causes death or injury to life or limb, the agent himself is punishable criminally for such negligence. The principal never could be so punished. His civil responsibility, therefore, is discharged by the contract. There is no reason why the defendants should be responsible for the gross negligence of their agents, more than for slight negligence." Selden, C. J., Denio, Davies, Allen and Gould, JJ., concurred. In Bissell *v.* R. Co., 29 Barb. 602, 25 N.Y., 442, the ticket was a stock pass, with conditions similar to those in the Perkins case, except that he had signed at the time of delivery of the stock a contract by which it was agreed that the persons "riding free" to take charge of the stock did so at their own risk of personal injury from whatever cause. The holder was killed in a collision, and the jury retured a verdict against the company for $5000, finding that the death

to be the American doctrine on the subject. The courts of those States in which the question is not yet judicially determined remain free to adopt that view which may seem to them most in harmony with the principles of justice and sound reason, and most conducive to the public good.

The arguments on the one side may be summed up as follows:

1. While the relation of carrier and passenger is created by contract, one duty of the carrier is independent of contract, is not the subject of contract, exists without it, and cannot be dispensed with by it. This duty of the carrier to use the highest degree of care to insure the safety of the passenger, is not allowed to be settled by a contract between carrier and passenger, because the employment is a matter not of private, but of public concern. This duty is a public one because it is founded on a regard for the safety of the passenger not on his own account, but as a citizen of the State, and grows out of the interest which the government, as *parens patriae*, has in protecting the lives and limbs of its subjects. Whether the passenger is one for hire, a mere gratuitous passenger or a gratuitous passenger who has bargained away his

of Bissell was caused by the gross negligence of the agents and servants of the defendants, the circuit judge charging them on the different degrees of negligence as recognized by the common law, and that the defendants could only be held liable for gross negligence. On appeal to the Supreme Court the judgment was unanimously affirmed, opinions being delivered by Johnson, Strong and Smith, JJ. On appeal to the Court of Appeals this judgment was reversed, Gould, Selden, Smith, Davies and Allen, JJ., voting for reversal, Denio, C. J., and Wright and Sutherland, JJ., dissenting. Gould and Selden, JJ., held that he was a free passenger, and could not show that the consideration paid for the carriage of the stock entered into the consideration for his own transportation, since he had expressly admitted that he was "riding free." And in their opinion contract exempting liability for negligence of servants or agents were valid in the case of gratuitous carriage of a passenger. Smith, J., thought the case was settled by the decison in the Welles and Perkins cases. Denio, C. J., was of the opinion that if Bissell were a free passenger the Perkins case must conclude the plaintiff from recovering. But in his opinion the plaintiff was not a free passenger.

individual rights, the interest of the State in his safety as one of its citizens, is precisely the same.

2. If it is objected that it is unreasonable to suppose that the carrier will lessen his vigilance and care for the safety of his vehicles and his passengers, because there may be a few on board for whom he is not responsible, this could be urged with equal force and propriety in the case of a merely gratuitous passenger, as in a case of one who has contracted away his rights. Yet in every court in this country, as we have seen, the carrier is held to the same degree of liability for a gratuitous passenger as for a passenger for hire.[1] Supposing, however, (what is not improbable, as in the case of a free excursion), that most or all of the passengers upon a train were gratuitous, or riding upon free passes, containing a release of liability, the above argument would be no answer to a claim that the carrier should be responsible. A general rule can not be based upon such calculations of chances.

3. The more stringent the carrier's liability, and the more rigidly it is enforced, the greater will be the care he will exercise, and more approximately perfect the safety of all passengers. Pecuniary liability for neglect promotes care. To allow an exception in the case of free passengers, would encourage negligence by diminishing the motives for diligence. The unvarying enforcement of his liability for neglect in all cases brings home to him in the most forcible, and effectual way, the necessity for strictly fulfilling his obligations. It might be that on a given occasion, the gratuitous passenger, or the passenger upon a free pass was the only person injured, or the only party who will sue the carrier, and thus practically enforce upon him the importance of a faithful discharge of his duty. Es-

[1] See *ante* § 246

caping in such a case from liability at the suit of this kind of a passenger, he would escape all liability whatever.

On the other side, it is insisted that there will scarcely be, at any time, so many persons traveling upon free passes with conditions limiting liability, as to tempt the carrier to be less careful in the management of his vehicles or in any other duty which he is bound to perform towards paying passengers.[1] The carrier and the passenger cannot be said to stand on an unequal footing, as is the case where the carrier exacts a limited liability for the carriage of goods or passengers for hire, for he is not likely to urge upon others the acceptance of free passes with conditions, and one who makes a gift should certainly have a right to prescribe the terms on which it is given.[2] The service (toward the passenger with a conditional free pass) which he undertakes to perform is one which he is under no obligation to perform, and is outside his regular duties. In yielding to the solicitation of the passenger, he consents for the time being to put off his public employment and do that which he is not bound to do.[3] The carrier who transports a passenger gratuitously is analogous to a bailee for the sole benefit of the bailor, and like him, should be held responsible for gross neglect only.[4] Finally, the fact that a gratuitous passenger is obliged to agree to travel at his own risk, will not only make him more

1 Rogers *v.* Kennebeck Steam Co., 29 Atl. Rep. 1069 (Me.); Quimby *v.* R. Co., 23 N. E. Rep. 205 (Mass.).

2 Quimby *v.* R. Co., 23 N. E. Rep. 205; (Mass.); Griswold *v.* R. Co., 53 Conn. 371; 55 Am. Rep. 115.

3 Quimby *v.* R. Co., 23 N. E. Rep. 205 (Mass.). But why does he not as well "put off his public employment" when the passenger is carried free without any limiting agreement? The carrier is not bound to carry free of charge, yet as we have seen he is liable to the same care in such case as if he were carrying for hire.

4 Annas *v.* R. Co., 67 Wis. 46; 57 Am. Rep. 388; Quimby *v.* R. Co., 23 N. W. Rep. 205 (Mass.). This argument is sufficiently answered in Philadelphia etc. R. Co. *v.* Derby, 14 How. 468, *ante*.

careful, but will tend to diminish the number of passes issued.[1]

§ 250. **Special Contracts with Passengers.**—The passenger may, by special contract with the carrier, obtain the right to be carried to a particular place or within a certain time, in which case the carrier is liable absolutely for the breach of his agreement.[2] If he has agreed to carry the passenger on a particular vehicle,[3] or to a particular place,[4] or on a particular day,[5] no plea of danger or act of God or other impossibility will be heard. If a passenger has contracted for a particular seat, he cannot be compelled to take another,[6] and he may take his seat at any time during the journey, and the carrier must not fill his place with another passenger.[7] A promise by a sleeping car company that a certain berth or section will be reserved for the plaintiff constitutes a contract with him, and it is no defense that another person demanded it before the plaintiff presented himself to occupy and pay for it, and that there was no other unoccupied.[8]

1 Rogers *v.* Kennebec Steam Co., 29 Atl. Rep. 1069.

2 Howard *v.* Cobb, 19L. R. 377; Indianapolis etc. R. Co. *v.* Birney, 71 Ill. 391; Hawcroft *v.* R. Co., 21 L. J. Q. B. 178; Hobbs *v.* R. Co., L. R. 10 Q. B. 111; Hein *v.* McCaughan, 32 Miss. 17; New Orleans etc. R. Co. *v.* Hurst, 36 Miss. 660; 74 Am. Dec. 785; Porter *v.* The New England, 17 Mo. 290; Florida etc. R. Co. *v.* Katz, 23 Fla. 139; 1 South Rep. 473.

3 Williams *v.* Vanderbilt, 28 N. Y. 217; 84 Am. Dec. 333; 29 Barb. 491; Ward *v.* Vanderbilt, 4 Abb. App. 521.

4 McGloin *v.* Henderson, 6 La. 715; The Canadian, 1 Brown Adm. 11; Coppin *v.* Brathwaite, 8 Jur. 875; Sunday *v.* Gordon, 1 Blatchf. & H. 569; Dennison *v.* The Wataga, 1 Phila. 468; Porter *v.* The New England, 17 Mo. 290; West *v.* The Uncle Sam, 1 McAll. 505; Brown *v.* Harris, 2 Gray, 359; Watson *v.* Duykinck, 3 Johns. 335; Thompson *v.* R. Co., 50 Miss. 315; 19 Am. Rep. 12. While a passenger has no right to insist upon being put off a train at a place not a regular station, a contract to put him off there may be implied from custom. Hull *v.* R. Co., 66 Tex. 612; 2 S. W. Rep. 831.

5 Walsh *v.* R. Co., 42 Wis. 23; 24 Am. Rep. 376.

6 Long *v.* Horne, 1 Car. & P. 610.

7 Ker *v.* Mountain, 1 Esp. 27.

8 Pull. Pal. Car Co. *v.* Booth, 28 S. W. Rep. 719 (Tex.), the Court saying: "The demand for the berth on the one hand, and the promise to furnish it on the other, constituted a contract, which obligated her or her husband to pay for the same, and obligated the company to furnish it, and these mutual obligations and promises constituted a valid considera-

CHAPTER XVII.

THE DUTIES AND LIABILITIES DURING TRANSIT.

SECTION 251. Must Furnish Seat.
252. And Means of Refreshment.
253. Must carry Passenger to Destination.
254. Must enable him to Land Safely.
255. Powers of Carrier to Establish Regulations.
256. Passenger may be Ejected for Violation of Regulations.
257. Mode and Place of Ejection.
258. Passenger's Right to Resist Ejection.
259. No Right to Imprison.
260. Non-payment of Fare.
261. Requiring Previous Purchase of Tickets.
262. Showing and Surrendering Ticket.
263. Other Regulations as to Tickets.
264. Concerning use of Carrier's Premises.
265. Classification of Passengers.
266. Passengers on Freight Trains.
267. Dangerous and Disorderly Passengers.
268. Notice of Regulations.
269. Persons under Physical or Mental Disability.

§ 251. **Must Furnish Seat.**—The contract of a carrier by rail is not only to furnish a passenger with transportation, but comfortable transportation. The

tion for the contract. Defendant having contracted to furnish section 2 of the sleeping car for her, it was bound to reserve the same for her, and it could not excuse the failure to comply with its undertaking upon the ground that other persons demanded the same before she presented herself to pay for or occupy it. While the company would be bound to furnish other persons with such accommodations as long as they reasonably could upon demand, and this was a duty owing to the public, it had the right, and it was not in detriment of the rights of the public, to make the contract with plaintiff. The contract was not against public policy. If other persons applied for berths, and there was not sufficient room, it would not be the duty of the defendant to break its contract with plaintiff to accommodate them. If it owed duties to such persons, they would depend upon other considerations, and not upon the right to violate the express contract with plaintiff. It owed the same duties to plaintiff as to other persons, and had the right to contract to perform them. It violated its contractual obligation to plaintiff if it sold the berths reserved for plaintiff to other persons."

contract is no more performed by furnishing him with a seat without transportation than with transportation without a seat.[1] The passenger need not pay his fare, nor (as it is the evidence of the contract which entitles him to one) surrender his ticket until he is given a seat;[2] and he is not obliged to search for one; the carrier's duty is to provide him with it.[3] If he cannot find a seat in the car of the class of which he is, it is the passenger's right to enter (without using force) a car in which otherwise he would have no right to be, as for example, a parlor car,[4] or a car set apart for women,[5] and remain there until he is provided with the seat which he is entitled to. But he cannot ride free, because there is no seat for him; if he choses to ride without one he must pay his fare; if unwilling to do so, his remedy is to leave the train at the first stopping place and sue the carrier for the breach of contract.[6] As he may lawfully be ejected if he refuses to leave the train or surrender his ticket it would hardly be a waiver of his right to sue, for him to remain on the train and pay his fare.[7] The carrier is liable for injuries resulting from his failure in this respect, as where the passenger is injured while passing to another car to find a seat.[8]

1 Memphis etc. R. Co. *v.* Benson, 85 Tenn. 627; 4 Am. St. Rep. 776; 4 S. W. Rep. 5; Bass *v.* R. Co., 36 Wis. 450; 17 Am. Rep. 75; 39 Wis. 636; 42 Wis. 654; 24 Am. Rep. 437; Thorpe *v.* R. Co., 76 N. Y. 404; 32 Am. Rep. 325. As to carriers by water, see Burton *v.* West Jersey Ferry Co., 114 U. S. 174; 5 S. C. Rep. 960.

2 Memphis etc. R. Co. *v.* Benson, *supra;* Davis *v.* R. Co., 53 Mo. 317; 14 Am. Rep. 457; Hardenbergh *v.* R. Co., 39 Minn. 3; 12 Am. St. Rep. 610; 38 N. W. Rep. 625.

3 Willis *v.* R. Co., 32 Barb. 399; 34 N. Y. 670; Thorpe *v.* R. Co., *supra.* "If passengers appropriate more than one seat each, leaving others without seats, it is not the duty or the right of the latter to wrangle or struggle with the former for seats; it is the duty of the proper officers of the train to regulate that." Bass *v.* R. Co., *supra.*

4 Thorpe *v.* R. Co., *supra.*

5 Bass *v.* R. Co., *supra.*

6 Memphis etc. R. Co. *v.* Benson, *supra;* Davis *v.* R. Co., *supra,* and the carrier cannot eject him short of that; Hardenbergh *v.* R. Co., *supra.*

7 St. Louis etc. R. Co. *v.* Leigh, 45 Ark. 368; 55 Am. Rep. 558.

8 Camden etc. R. Co. *v.* Hoosey, 99 Pa. St. 492; McIntyre *v.* R. Co., 37 N. Y. 274; Costikyan *v.* R. Co., 58 Hun. 590; 12 N. Y. S. 683; Dewire *v.* R. Co., 148 Mass. 346; 19 N. E. Rep. 523.

He may assume, when he is allowed to enter a train, that the carrier has provided sufficient seats,[1] yet if he knows when he enters the train that there is no room, he cannot complain if he is required to go temporarily into the smoking car where seats are to be had.[2]

§ 252. **And Means of Refreshment.**—In conveying passengers on long journeys, a carrier is required, by humanity as well as by law, to provide his passengers with easy modes, and to allow them reasonable time for the purpose of sustaining life by means of food and necessary refreshments.[3] He must provide safe passage way to and from his cars to the eating houses,[4] and it matters not whether they are under control of the carrier or of third persons.[5] He must give information as to the time of stopping at such places, as well as reasonable notice before the train stops,[6] and must warn the passengers when the time has expired.[7]

§ 253. **Must Carry Passenger to Destination.**—It is a breach of the contract of carriage to carry a passenger beyond his destination,[8] and he is entitled to have notice of the fact that the station at which he desires to alight has been reached;[9] and when the

1 Hardenburg *v.* R. Co., *supra.*

2 Memphis etc. R. Co. *v.* Benson, *supra.*

3 Peniston *v.* R. Co., 34 La. Ann. 777; 44 Am. Rep. 444.

4 Jeffersonville etc. R. Co. *v.* Riley, 39 Ind. 586; State *v.* R. Co., 58 Me. 176; 4 Am. Rep. 258; Hrebrik *v.* Carr, 29 Fed. Rep. 208; Chrissman *v.* R. Co., 9 Hun. 618; 73 N. Y. 606; Mitchell *v.* R. Co. 30 Ga. 22; Dodge *v.* Boston S. S. Co., 148 Mass. 406; 19 N. E. Rep. 373; Lakin *v.* R. Co., 15 Oreg. 220.

5 See *post;* Peniston *v.* R. Co., *supra.*

6 Ray, Pass. Carr. 156.

7 State *v.* R. Co., 58 Me. 176; 4 Am. Rep. 258; Mitchell *v.* R. Co., 30 Ga. 22; Peniston *v.* R. Co., 34 La. Ann. 777; 44 Am. Rep. 444.

8 New Orleans etc. R. Co. *v.* Hurst, 36 Miss. 660; 74 Am. Dec. 785; Sunday *v.* Gordon, 1 Blatchf. & H. 569; Pitts. etc. R. Co. *v.* Nuzum, 50 Ind. 141; 19 Am. Rep. 703; Mobile etc. R. Co. *v.* McArthur, 43 Miss. 180; Memphis etc. R. Co. *v.* Whitfield, 44 Miss. 460; 7 Am. Rep. 699; Thompson *v.* R. Co., 50 Miss. 315; 19 Am. Rep. 12.

9 Southern R. Co. *v.* Kendrick, 40 Miss. 374; Imhoff *v.* R. Co., 20 Wis. 344; Keller *v.* R. Co., 2 Abb. App. 480; 17 How. Pr.

name of a station is called, a passenger may presume that the next stop is at that station.[1] So, where the passenger is notified that he is at his stopping place when he is not, and he alights, the carrier is liable for injury to him resulting thereby.[2] When a train has come to a full stop to enable passengers to alight, and, without notice it is suddenly moved, causing injury to those alighting, it is negligence, whether the motion is in a backward or forward direction.[3] But there is no duty upon the conductor of a train to make personal inquiries of the passengers as to whether they desire to leave the cars at the station;[4] nor is he bound to wake up passengers who have fallen asleep.[5] The carrier must, however, stop the vehicle long enough to give all passengers intending to alight, a reasonable opportunity to do so,[6] and to remove their personal baggage and belongings.[7]

It is said in Iowa, Mississippi and South Carolina that where a railroad has provided a proper place and means for alighting from a car, and has stopped the train a reasonable length of time, it is not obliged to render passengers personal assistance, and that where

102; Dickens *v.* R. Co., 1 Abb. App. 504; 28 Barb. 41; New Orleans etc. R. Co. *v.* Statham, 42 Miss. 607; 97 Am. Dec. 478; Louisville etc. R. Co. *v.* Mask, 64 Miss. 738; 2 South Rep. 360; Dorrah *v.* R. Co., 65 Miss. 14; 7 Am. St. Rep. 629; 3 South. Rep. 36.

1 Central R. Co. *v.* Von Horn, 38 N. J. L. 183.

2 Penn. Co. *v.* Hoagland, 78 Ind, 203; Falk *v.* R. Co., 29 Atl. Rep. 158 (N. J.).

3 Milliman *v.* R. Co., 6 Th. & C. 585; 66 N, Y. 642; *aliter* in the case of freight trains Hemmingway *v.* R. Co., 67 Wis. 678; 31 N. W. Rep. 268.

4 Hurt *v.* R. Co., 94 Mo. 255; 4 Am. St. Rep. 374; 7 S. W. Rep. 1; Penn. R. Co. *v.* Kilgore, 32 Pa. St. 294.

5 Texas etc. R. Co. *v.* Alexander, 30 S. W. Rep. 1113 (Tex.). Even though he has promised them to do so. Munn *v.* R. Co., 71 Ga. 710; 51 Am. Rep. 284; Sevier *v.* R. Co., 61 Miss. 8; 48 Am. Rep. 74.

6 Curtis *v.* R. Co., 23 Wis. 152; 27 Wis. 158; South. etc. R. Co. *v.* Kendrick, 40 Miss, 374; Dickens *v.* R. Co., 1 Abb. App. 504; Fairmount etc. R. Co. *v.* Stutler, 54 Pa. St. 375; 93 Am. Dec. 714; Roberts *v.* Johnson, 58 N. Y. 613; 5 Jones & S. 157; Houston etc. R. Co. *v.* Gorbett, 49 Tex. 573; Mulhado *v.* R. Co., 30 N. Y. 370; Jeffersonville etc. R. Co. *v.* Parmalee, 51 Ind. 42; Toledo etc. R. Co. *v.* Baddeley, 54 Ill. 19; 5 Am. Rep. 71; Louisville etc. R. Co. *v.* Mask, 64 Miss. 738; 2 South Rep. 360. So as in case of street cars; Crissey *v.* R. Co., 75 Pa. St. 83; Poulin *v.* R. Co., 64 N. Y. 621.

7 Hurt *v.* R. R. Co., *supra.*

it is done—as in case of females or sick passengers—it is an act of courtesy on the part of the servants of the carrier, and not a right.[1]

Where passengers are permitted to alight at a way station or other stopping place, or where the vehicle stops for any reason, the servants of the carrier must notify them that the vehicle is about to start and the journey to be resumed. But they are not bound or required to go after those who have gone away, and out of sight and out of reach of the voice, unless there be some customary signal as by blowing a whistle, or ringing a bell, in which case such signal must be given.[2] So, where a train stops between stations, and the passengers leave the train without objection from the conductor, it is negligence to start the train without first giving the passengers timely warning to return.[3]

§ 254. **Must Enable him to Land Safely.** — In cases of injuries to passengers on account of the stopping of the trains in such a way as to lead passengers to suppose that they are invited to alight, while in reality the train has not reached the platform, or has overshot it, and the pasenger is injured in alighting at a dangerous place,[4] the law is that (*a*) there must be evidence sufficient to induce a reasonable man to believe that the train is actually at the alighting platform, and that the passengers are invited to alight, and (*b*) there must be the exercise of such care upon the part of the passenger as to free him from the charge

1 Raben *v.* R. Co., 34 N. W. Rep. 621; 73 Ia. 579; 5 Am. St. Rep. 708; New Orleans etc. R. Co. *v.* Statham, 42 Miss. 607; 97 Am. Dec. 478; Simms *v.* R. Co., 3 S. E. Rep. 201. But see Jeffersonville etc. R. Co. *v.* Hendrick's Adm'r, 26 Ind. 228; 41 Ind. 49.

2 State *v.* R. Co., 58 Me. 176; 4 Am. Rep. 259

3 Gulf etc. R. Co. *v.* Roundtree, 25 S. W. Rep. 987 (Tex.)

4 Terre Haute etc. R. Co. *v.* Buck, 96 Ind. 346; 49 Am. Rep. 168.

that his own contributory negligence was the real cause of the injury.[1]

(a) The mere calling out of the name of the station would not of itself entitle a passenger to alight if there were other circumstances which led him to believe that the car was not at the platform.[2] On the other hand, calling out the name and then stopping the vehicle generally would.[3] And the absence of all proof that the name of the station had been announced would not free a railroad from liability, if there had been other indications of an invitation to the passengers to leave the cars, as for instance, the opening of the doors or the like.[4] The question must be one of fact for the jury.[5]

(b) Where the conduct of the passenger in alighting is contrary to the dictates of common prudence, the liability for the injury he receives cannot be shifted to the carrier. This is generally very clear where the passenger, seeing that he is being carried beyond his destination, leaps from a train in rapid motion.[6] But in the cases we are considering here, the danger to the passenger is not so patent—nevertheless his lack of care may be evident. Thus, in an English case, the car was carried beyond the station, and stopped upon an embankment above a roadway. The night was dark, and there was no light in the carriage, nor on the platform; nor was there any fence on the top of the embankment, between it and the roadway

1 Browne Carr., § 486.

2 Browne Carr., § 457; Lewis *v.* R. Co., L. R. 9 Q. B. 66; Penn. Co. *v.* Aspell, 23 Pa. St. 147; 62 Am. Dec. 323; Mitchell *v.* R. Co., 51 Mich. 236; 47 Am. Rep. 566; 16 N. W. Rep. 388; Frost *v.* R. Co., 10 Allen 387; 87 Am. Dec. 668.

3 Bridges *v.* R. Co., L. R. 7 H. L. 213; Weller *v.* R. Co., L. R. 9 Com. P. 126; Taber *v.* R. Co. 71 N. Y. 489; Central R. Co. *v.* Van Horn, 38 N. J. L. 133; Columbus etc. R. Co. *v.* Farrell, 31 Ind. 408; Memphis etc. R. Co. *v.* Stringfellow, 44 Ark. 321; 51 Am. Rep. 598.

4 Praeger *v.* R. Co., 24 L. T. (N. S.) 105; 24 L. J. (N. S.) 105; Cockle *v.* R. Co., L. R. 7 C. P, 323; St. Louis etc. R. Co. *v.* Cantrell, 37 Ark. 519; 40 Am. Rep. 105.

5 Browne Carr., § 488.

6 See *post*, § 308.

underneath. The plaintiff was aware that his car had overshot the platform, and, without waiting to see whether it would be backed up to the platform, got out in the dark, missed his footing, and fell forward over the embankment. The carrier was held not liable.[1] If a passenger is injured by knowingly alighting at a place where there is no platform, when, by passing to a forward car he could alight with safety on the platform, he is guilty of negligence, and cannot recover.[2]

§ 255. **Power of Carrier to Establish Regulations.** — The right of a carrier to make regulations within the limits of his charter,[3] for the management of his business and for the safety and convenience of the public, is acknowledged, provided they are lawful and reasonable.[4] The reasonableness of a particular regulation has been said by some courts to be a question of law;[5] by others to be a question of fact;[4] but the weight of authority is to the effect that it is a mixed question of law and fact.[6] As examples of unreason-

1 Harold *v.* R. Co. 14 L. T. (N. S.) 440; Lewis *v.* R. Co., L. R. 9 Q. B. 66, and see Frost *v.* R. Co. 10 Allen, 387; Mitchell *v.* R. Co. 51 Mich. 236; 47 Am. Rep. 566; 16 N. W. Rep. 388.

2 Eckerd *v.* R. Co., 70 Ia. 353. But see Cartwright *v.* R. Co., 52 Mich. 606; 50 Am. Rep. 274; 18 N. W. Rep. 380.

3 A regulation inconsistent with its charter provisions is invalid. Chicago etc. R. Co. *v.* People, 56 Ill. 365.

4 Day *v.* Owen, 5 Mich. 520; 72 Am. Dec. 62; Du Laurens *v.* R. Co., 15 Minn. 49; 2 Am. Rep. 102; Gleason *v.* Goodrich Trans. Co., 32 Wis. 85; Chicago etc. R. Co. *v.* Williams, 55 Ill. 185; Penn Co. *v.* Langdon, 92 Pa. St. 21; Houston etc. R. Co. *v.* Moore, 49 Tex. 31; State *v.* Overton, *post.*

5 Hoffbauer *v.* R. Co., 52 Ia. 342; Hibbard *v.* R. Co., 15 N. Y. 455; Vedder *v.* Fellows, 20 N. Y. 126, the court saying: "There are strong reasons why the reasonableness of railroad regulations should, in the absence of any positive proof as to their effect, be submitted to the court as a question of law, rather than to the jury as one of fact. Ordinarily, jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule. They are apt to listen to any allegations of injuries on railways. What one jury might deem an inconvenient rule, another might approve as judicious and proper. There would be no uniformity." State *v.* Overton, 24 N. J. L. 435; 61 Am. Dec. 671; State *v.* Chovin, 7 Ia. 204.

6 Thomp. Carr. Pass., 335; 1 Redf. Ry. 95. Bass *v.* R. Co., 36 Wis. 450; Brown *v.* R. Co., 4 Fed. Rep. 37; 7 Fed. Rep. 51. In Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62, it is said: "The reasonableness of a

able regulations, may be mentioned a rule forbidding conversation among passengers, or prohibiting them from changing their seats,[1] or from wearing a certain dress, or a certain cap or badge,[2] or that the amount of fare paid should be the measure of recovery for the violation of the contract of carriage.[3]

The regulations of the carrier generally have reference to the purchase, production or surrender of tickets, the use of the carrier's premises, the classification of passengers, and the vehicles in which they may ride, and the conduct of the passenger.

In a recent case in Texas, regulations of the carrier restricting passengers to the use of one seat if the cars were not crowded, and to half a seat if they were crowded, and not allowing the backs of seats to be turned so as to make two seats face each other, and not allowing passengers to place baggage on the seats in front of them, were considered reasonable.[4]

§ 256. **Passenger may be Ejected for Violation of Regulations.**—For the failure to observe the proper and reasonable regulations of the carrier, the penalty is ejection or exclusion from the carrier's vehicles or premises. The violated regulation may be a police regulation,[5] or a regulation concerning the ticket or payment of fare. It is generally held that after the train has been stopped to eject the passenger, he cannot save himself by tendering the proper fare or

rule or regulation is a mixed question of law and fact to be found by the jury on the trial, under the instructions of the court. It may depend on a great variety of circumstances, and may not properly be said to be in itself a fact to be deduced from other facts. It is not to be inferred from the rule or regulation itself, but must be shown positively."

1 State *v.* Overton, 24 N. J. (L.) 435 *Ogden J.*

2 South Fla. R. Co. *v.* Rhodes, 25 Fla. 40; 5 South. Rep. 633.

3 Galveston etc. R. Co. *v.* Kinnebrew, 27 S. E. Rep. 631 (Tex.).

4 Gulf, etc. R. Co. *v.* Moody, 30 S. W. Rep. 574 (1895).

5 See § 267.

ticket,[1] on the ground that to allow a passenger to test the carrier's regulations and the conductor's firmness by refusing to pay, or produce a ticket, and still save himself from expulsion by tendering the proper fare after expulsion had commenced, would be an intolerable annoyance both to the carrier and to his other passengers.[2] But it is clear that the passenger may rightly change his mind before the expulsion has commenced,[3] or his fare may be paid for him by another.[4]

A person who has been rightfully ejected from a railroad car cannot claim to be readmitted to the train.[5] This, for two reasons, 1st: The right to refuse to transport him farther, and to eject him from the train, would be an idle and useless exercise of legal authority if the party who had hitherto refused to perform the contract by paying his fare when duly demanded, could immediately re-enter the cars and claim the fulfillment of the original contract by the carrier.[6] 2nd: If one passenger might, by his unjustifiable humor cause the cars to stop, another might do the same thing, and thus the utmost irregularity in the running of the train might be produced, jeopardizing the safety of the company's property and the lives of all on board.[7] Some cases limit this right to the stoppage of the train at some place not a regular stopping place, and hold that if a passenger is ejected at a regular station he may, on tendering his fare, or a proper ticket, re-

1 People *v.* Jillson, 3 Park. C. C. 234; Hibbard *v.* R. Co., 15 N. Y. 455; Stone *v.* R. Co. 47 Ia. 52; 29 Am. Rep. 458; Pease *v.* R. Co., 101 N. Y. 367; 54 Am. Rep. 699; 5 N. E. Rep. 37; Clark *v.* R. Co., 91 N. C. 506; 49 Am. Rep. 647.

2 Hoffbauer *v.* R. Co., 52 Ia. 342; 35 Am. Rep. 278; 3 N. W. Rep. 121.

3 Gould *v.* R. Co., 18 Fed. Rep. 155; Texas etc. R. Co. *v.* Bond, 62 Tex. 442; 50 Am. Rep. 532.

4 Louisville etc. R. Co. *v.* Garrett, 8 Lea 438; 41 Am. Rep. 640.

5 State *v.* Campbell, 32 N. J. (L.) 369; Pease *v.* R. Co., 11 Daly, 350; O'Brien *v.* R. Co., 15 Gray, 20; 77 Am. Dec. 347; Stone *v.* R. Co., 47 Iowa, 82; 29 Am. Rep. 458; Hoffbauer *v.* R. Co. 52 Ia. 279; 35 Am. Rep. 278; 3 N. W. Rep. 121.

6 O'Brien *v.* R. Co., *supra.*

7 Thomp. Carr. Pass. 29.

sume his journey.[1] But it is said in one case, that he must tender fare or a ticket from the station where he originally boarded the train.[2] And the carrier has no right, because of a previous breach of its rules, or because the person is its debtor for a previous ride, to refuse to carry him.[3]

§ 257. **Mode and Place of Ejection.**—The ejection must be made in a proper manner. The carrier will be liable if his servants make the expulsion from a moving vehicle,[4] or use more force than is necessary for the purpose.[5]

The carrier is not obliged to wait until his vehicle reaches a station or usual stopping place, but he may eject the person at any place, unless it be an unsafe place, or one where he would be obviously exposed to danger.[6] Statutes are in force in England and in some

1 O'Brien *v.* R. Co., 15 Gray, 20; Nelson *v.* R. Co., 7 Hun. 140; O'Brien *v.* R. Co., 80 N. Y. 236; South Car. R. Co. *v.* Nix, 68 Ga. 572.

2 Stone *v.* R. Co., 47 Ia. 82; 29 Am. Rep. 458.

3 State *v.* R. Co., 48 N. J. 55; 57 Am. Rep. 543.

4 State *v.* Kinney, 34 Minn. 311; Holmes *v.* Wakefield, 12 Allen, 580; Carter *v.* R. Co., 98 Ind. 552; 49 Am. Rep. 780; Sanford *v.* R. Co., 23 N. Y. 343; 80 Am. Dec. 286; Law *v.* R. Co., 32 Ia. 234; Penn. R. Co. *v.* Vandiver, 42 Pa. St. 365; *aliter* if it is moving so slowly as not to make descent dangerous. Healy *v.* R. Co., 28 Ohio St. 23; Murphy *v.* R. Co., 118 Mass. 228; Kline *v.* R. Co., 37 Cal. 400. Without actual force used, the employment of a show of force compelling him to jump from a moving car is illegal. Kline *v.* R. Co., 39 Cal. 400; 99 Am. Dec. 282.

5 State *v.* Ross, 26 N. J. L. 224; Murphy v. R. Co., 118 Mass. 228; Seymour *v.* Greenwood, 7 Hurl. & N. 355; 6 Hurl. & N. 359; Railroad Co. *v.* Valleley, 32 Ohio St. 345; 30 Am. Rep. 601; Passenger R. Co. *v.* Young, 21 Ohio St. 518; 8 Am. Rep. 78; Ramsden *v.* R. Co., 104 Mass. 117; 6 Am. Rep. 200; Peck *v.* R. Co., 70 N. Y. 587; Rounds *v.* R. Co., 64 N. Y, 129; 21 Am. Rep. 597; Coleman *v.* R. Co., 106 Mass. 160; Higgins *v.* R. Co., 46 N. Y. 23; 7 Am. Rep. 293; Phila. etc. R. Co. *v.* Larkin, 47 Md. 155; 28 Am. Rep. 442; Penn. R. Co. *v.* Vandiver, 42 Pa. St. 365; 82 Am. Dec. 520; Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420; 92 Am. Dec. 138; Louisville etc. R. Co. *v.* Whitman, 79 Ala. 328.

6 McClure *v.* R. Co., 34 Md. 532; 6 Am. Rep. 345; Great West R. Co. *v.* Miller, 19 Mich. 305; Jeffersonville etc. R. Co. *v.* Rogers, 28 Ind. 1; 92 Am. Dec. 276; Everett *v.* R. Co., 69 Iowa, 15; 58 Am. Rep. 207; 28 N. W. Rep. 410; Wyman *v.* R. Co., 34 Minn. 210; 25 N. W. Rep. 349. *Contra*, Maples *v.* R. Co., 38 Conn. 557; 9 Am. Rep. 434, holding that it must be at a station. In Kentucky a conductor expelled a drunken passenger at a place not a station and in the snow with the result that he was badly frozen. The railroad was held liable. Louisville etc. R. Co. *v.* Sullivan, 81 Ky. 624; 50 Am. Rep. 186. In a remarkable case, a passenger who had by mistake boarded the wrong train at night was ejected at a dangerous place at night among numer-

of the States, providing that persons refusing to pay fare may be ejected at a usual stopping place or near a dwelling house,[1] and it is held that these prohibit the ejection of a passenger at any other place;[2] that they do not cover a case of refusing to surrender a ticket, or violating any other of the carrier's regulations,[3] nor the case of trespassers or persons going upon a train with no intention of paying fare.[4]

§ 258. **Passenger's Right to Resist Ejection.**— Where the conductor or other servants of the carrier have no authority to expel the passenger, or attempt to expel him in an improper manner, or at an improper place, he has a right to resist the attempt, and resistance may be lawfully made to such an extent as may be essential to maintain this right.[5] Though it is sometimes said by individual judges that it is better for the passenger to quietly accede than to run the risk of injury at the hands of the carrier's servants, these remarks are rather in the nature of good natured advice than statements of duty; and are usually found in those judgments where a passenger is sueing for an ejection brought about through the mistake or neglect

ous car tracks, and afterwards struck by a train and severely injured. He had begged the conductor to take him to the next station and had offered to pay his fare. The Supreme Court affirmed a verdict of $48,000 against the railroad, although the trial judge, in charging on the subject of exemplary damages, characterized the ejection as wrongful, wanton, inhuman, and wholly unjustified: Lake Shore etc. R. Co. *v.* Rosenzweig, 113 Pa. St. 519; 6 Atl. Rep. 545; and see Bass *v.* R. Co., 36 Wis. 450.

1 Terre Haute etc. R. Co. *v.* Vanatta, 21 Ill. 188; 74 Am. Dec. 96; Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438; 92 Am. Dec. 81; Chicago etc. R. Co. *v.* Flagg, 43 Ill. 364; 92 Am. Dec. 133. A water tank is not a "usual stopping place." Chicago etc. R. Co. *v.* Flagg, 43 Ill 364; 92 Am. Dec.133.

2 Chicago etc. R. Co. *v.* Parks, 18 Ill. 460; Chicago etc. R. Co. *v.* Peacock, 48 Ill. 253; Stephen *v.* Smith, 29 Vt. 160; *contra*, Toledo etc. R. Co. *v.* Wright, 68 Ind. 586; 34 Am. Rep. 277.

3 Ill. Cent. R. Co. *v.* Whittemore, 43 Ill. 420; 92 Am. Dec. 138; South Fla. R. Co., *v.* Rhodes, 25 Fla. 40; 5 South. Rep. 633.

4 Lillis *v.* R. Co., 64 Mo. 464; 27 Am. Rep. 255; Chicago etc. R. Co. *v.* Boger, 1 Brad. App. 472. But see Chicago etc. R. Co. *v.* Peacock, 48 Ill. 253; Chicago etc. R. Co. *v.* Roberts, 40 Ill. 503.

5 English *v.* R. Co., 66 N. Y. 454; 23 Am. Rep. 69; 4 Hun. 683; Sanford *v.* R. Co., 23 N. Y. 343; 80 Am. Dec. 286; Hufford *v.* R. Co., 53 Mich. 118; 18 N. W. Rep. 580; Brown *v.* R. Co., 7 Fed. Rep. 52.

of some other servant of the carrier. Where, for example, the passenger's ticket does not entitle him to the passage demanded, the ticket being conclusive between conductor and passenger, the passenger must not resist, for the conductor is in the right,[1] and though the carrier has broken his contract, yet "no one has a right to resort to force for the performance of a contract made with another."[2] But it is different where the ejection is illegal, for the passenger here is merely resisting an unauthorized assault upon his person or an unjustifiable invasion of his rights.[3]

In ejecting a passenger from a train, the servants of the carrier have no right to place the baggage of the passenger in a place where it will be injured, and to prevent his baggage from being injured, he has the right to use such force as is necessary.[4]

§ 259. **No Right to Imprison.**—And though a carrier may eject, he cannot imprison or detain a passenger until he produces a ticket or pays his fare, for this would be equivalent to imprisonment for debt.[5]

In *Lynch* v. *Metropolitan R. Co.*,[6] an elevated railroad company collected no fare or tickets at the receiving station, or on the train, but required passengers to drop their tickets or fare into a box at the door of the station to which they were carried. A passenger, having lost his ticket on the route, stated the fact to the gate-keeper at his destination, but was forbidden by him to pass unless he produced a ticket or paid his fare. He insisted on passing, and the gate-keeper caused his ar-

1 See Townsend *v.* R. Co., 56 N. Y. 295; 15 Am. Rep. 419; Murphy *v.* R. Co., 118 Mass. 228; and cases cited *ante* § 244.

2 English *v.* R. Co., 66 N. Y. 454; 23 Am. Rep. 67.

3 *Id.* Zagelmeyer *v.* R. Co., 60 N. W. Rep. 436 (Mich.).

4 Gulf, etc. R. Co. *v.* Moody, 30 S. W Rep. 574 (Tex.)

5 Standish *v.* Steamboat Co., 111 Mass. 512; 15 Am. Rep. 67; Lynch *v.* R. Co., 90 N. Y. 77; 43 Am. Rep. 141; Chilton *v.* R. Co., 16 M. & W. 212.

6 90 N. Y.; 77 Am. Rep. 141.

rest by the police. The company had ordered its gatekeepers not to allow passengers to go out unless they surrendered tickets or paid fares. It was held that the company was liable for false imprisonment. Said the Court: "It had no regulation, and could legally have none that a passenger before leaving its cars or premises, should produce a ticket, or pay his fare, and if he did not, that he should then and there be detained and imprisoned until he did do so. At most, the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare. The detention here was not to enable the gatekeeper to make any inquiry, but simply to compel payment. He was absolutely informed that he could not pass out without producing a ticket or paying his fare. This is not like the cases to which the learned counsel for the defendant has called our attention, where railroad conductors have been held justified in ejecting passengers from cars for refusing to produce tickets or pay their fares. A passenger has no right to ride in a car without payment of his fare, and if he refuses to pay, the railroad company is not bound to carry him, and may, at a proper place, and in a proper manner, remove him from the car, but it could not imprison him in a car until he paid his fare, for the purpose of

compelling payment. These views have the sanction of very high authority. In *Sunbolf* v. *Alford*,[1] it was held that an innkeeper could not detain the person of his guest in order to secure payment of his bill. Lord Abinger said: 'If an innkeeper has a right to detain the person of his guest for the non-payment of his bill, he has a right to detain him until the bill is paid, which may be for life; so that this defense supposes that by the common law, a man who owes a small debt for which he could not be imprisoned by legal process, may yet be detained by an innkeeper for life. The proposition is monstrous. * * * Where is the law that says a man shall detain another for his debt without process of law?' * * * It was argued before us on behalf of the defendant, that the ticket sold to the plaintiff was the property of the defendant, intrusted to him for a special purpose, and that it had the right to prevent him, at the end of the journey, from carrying away this property. I am not quite ready to assent that after the defendant sold the ticket to the plaintiff it retained any right of property therein. But even if it did, it did not detain him on that ground; and he did not then have the ticket in his possession or under his control, and hence, a detention to compel him to deliver it up could not, on that ground, be justified. There was no error in the charge of the judge in reference to the branch of the case we have thus far considered. The counsel of the defendant excepted to that portion of the charge of the judge, wherein he said in substance, that the defendant had no more right to detain plaintiff until he paid his fare than a lawyer would have to detain in his office, a client who consulted him and refused to pay his fee. There was no error in this illustration. The detention in either case is unlawful, and is condemned in the law upon pre-

[1] 3 M. W. 248.

cisely the same principles. There was no error in refusing to charge the request made by defendant's counsel, that 'the regulation of the defendant requiring passengers to produce and surrender a ticket or pay the legal fare before leaving the station, was a reasonable regulation.' It is true, that whether a regulation is a reasonable one or not, is a question of law for the court, but this request reached too far. It implied that the passenger was to remain in the station and submit to indefinite detention there until he paid his fare, and such a regulation would not be reasonable."

§ 260. **Non-payment of Fare.**—The passenger may be ejected for refusing to pay fare,[1] and the conductor may insist on his acceding to his demand for his fare within a reasonable time.[2] A passenger, being responsible for the fare of a child under his charge, may be ejected for refusal to pay such fare, though he has paid his own.[3] But where a conductor refused to pass a child on half fare because he believed it to be over age, and the mother refused to pay and left the train, although the conductor offered to pass her on her own ticket without the child, it was held that the carrier was liable for the ejection of both.[4] A lunatic, left in his seat alone by the person having him and his ticket in charge, may be expelled, although he does not understand the demand for his fare, where the carrier's servants have no notice of his mental condition.[5]

The conductor cannot retain the money tendered or

1 Shular *v.* R. Co., 92 Mo. 339; Great Western R. Co. *v.* Miller, 19 Mich. 305; Haley *v.* R. Co., 21 Iowa, 15; Chicago etc. R. Co. *v.* Boger, 1 Brad. App. 472; Lillis *v.* R. Co., 64 Mo. 464; 27 Am. Rep. 255; Ohio etc. R. Co. *v.* Muhling, 30 Ill. 9; 81 Am. Dec. 336; O'Brien *v.* R. Co., 15 Gray, 20; 77 Am. Dec. 347.

2 Fulton *v.* R. Co., 17 U. C. Q. B. 428.

3 Phila. etc. R. Co. *v.* Hoeflich, 62 Md. 300.

4 Gibson *v.* R. Co., 30 Fed. Rep. 374.

5 Willets *v.* R. Co., 14 Barb. 585.

the rejected ticket and eject the passenger for not paying the fare demanded.[1]

§ 261. **Requiring Previous Purchase of Tickets.** —A regulation is reasonable requiring passengers who have not purchased tickets to pay an extra sum in addition to the regular fare, as it tends to confine the collection of money to the proper accounting officers, and to prevent frauds by the train servants.[2] But to enforce such a regulation, proper facilities must be afforded the passengers to obtain tickets before entering the vehicle; an accessible place, sufficient force to supply all applicants,[3] and the office open a reasonable time before the advertised time of starting.[4] Other-

1 Du Laurans v. R. Co., 15 Minn. 49; 2 Am. Rep. 102; Bland *v.* R. Co., 55 Cal. 570; 36 Am. Rep. 50; Vankirk *v.* R. Co., 76 Pa. St. 66; 18 Am. Rep. 404. But see Hoffbauer *v.* R. Co., 52 Ia. 342; 35 Am. Rep. 278; 3 N. W. Rep. 121; Balt. etc. R. Co. *v.* McDonald, 68 Ind. 316.

2 Chicago etc. R. Co. *v.* Parks, 18 Ill. 460; St. Louis etc. R. Co. *v.* Dalby, 19 Ill. 353; Stephen *v.* Smith, 29 Vt. 160; St. Louis etc. R. Co. *v.* South, 43 Ill. 176; 92 Am. Dec. 103; Crocker *v.* R. Co., 24 Conn. 249; Porter *v.* R. Co., 34 Barb. 353; Bordeaux *v.* R. Co. 8 Hun. 579; State *v.* Chovin, 7 Iowa, 204; Du Laurans *v.* R. Co., 15 Minn. 49; 2 Am. Rep. 102; Indianapolis etc. R. Co. *v.* Rinard, 46 Ind. 293; Jeffersonville etc. R. Co. *v.* Rogers, 38 Ind. 116; 10 Am. Rep. 103; 28 Ind. 1; 92 Am. Dec. 276; Hilliard *v.* Goold, 34 N. H. 230; 66 Am. Dec. 765; People *v.* Jillson, 3 Park. Cr. 234; State *v.* Goold, 53 Me. 279, 281; Toledo etc. R. Co. *v.* Wright, 68 Ind. 586; 34 Am. Dec. 277; State *v.* Overton, 24 N. J. L. 671; 61 Am. Dec. 435; Cincinnati etc. R. Co. *v.* Skillman, 39 Ohio St. 444; Chicago etc. R. Co. *v.* Flagg, 43 Ill. 364; 92 Am. Dec. 133; Swan *v.* R. Co , 132 Mass. 116; Bland *v.* R. Co., 55 Cal. 570; 36 Am. Rep. 50. But the excess sum must be reasonable. Saunders *v.* R. Co., L. R. 5 Q. B. Div. 456; London etc. R. Co. *v.* Watson, L. R 6 C. P. Div. 49, and the fare collected on the train, including such additional amount, must not exceed the maximum allowed by statute. Zagelmeyer *v.* R. Co., 60 N. W. Rep. 436 (Mich.), citing R. Co. *v.* Skillman, 39 Ohio St. 444; Chase *v.* R. Co. 26 N. Y. 523. Where the train rate exceeds the legal rate the passenger need tender only the ticket rate. Smith *v.* R. Co. 23 Ohio St. 10. A regulation is valid refusing to carry passengers who have not purchased tickets and requiring the conductor to expel such. Lane *v.* R. Co., 5 Lea, 124.

3 Chicago etc. R. Co. *v.* Parks, 18 Ill. 460; 68 Am. Dec. 562; Porter *v.* R. Co., 34 Barb. 555; Nellis *v.* R. Co., 30 N. Y. 505; Du Laurans *v.* R. Co., 15 Minn. 49; 2 Am. Rep. 102; St. Louis etc. R. Co. *v.* South, 43 Ill. 176; 92 Am. Dec. 103; St. Louis etc. R. Co. *v.* Dalby, 19 Ill. 352; Chicago etc. R. Co. *v.* Flagg, 43 Ill. 364; 92 Am. Dec. 133; Jeffersonville etc. R. Co. *v.* Rogers, 38 Ind. 116; 10 Am. Rep. 103; 28 Ind. 1; 92 Am. Dec. 276; Indianapolis etc. R. Co. *v.* Rinard, 46 Ind. 293; Chose *v.* R. Co., 16 N. Y. 523; Forsee *v.* R. Co., 63 Miss. 66; 56 Am. Rep. 801.

4 Swan *v.* R. Co., 132 Mass. 116; 42 Am. Rep. 432; Everett *v.* R. Co., 69 Iowa, 15; 58 Am. Rep. 207; St. Louis etc. R. Co. *v.* South, 43 Ill. 176; 92 Am. Dec. 103; White *v.* R. Co., 26 W. Va. 800; see Porter *v.* R. Co., 34 Barb. 353, that the office must be kept open even after the advertised time if the train is delayed. By statute in

wise, the failure will be the fault of the carrier and not the neglect of the passenger.[1]

§ 262. **Showing and Surrendering Tickets.**—The passenger, by the carrier's rules may be required to exhibit a ticket before entering the vehicle,[2] or whenever called upon by the conductor or other proper officer.[3] So, a regulation is valid that the passenger shall surrender his ticket when called upon,[4] unless the passenger is some distance from his destination, in which case it would be unreasonable to enforce such a rule without giving him in return a check or other evidence of his right to ride.[5] It is no excuse that the passenger has lost or mislaid his ticket or forgotten to bring it with him.[6] But he is entitled to a reasonable length of time in which to find his ticket if he has mislaid it.[7] and where the passenger is under a physical disability which prevents him from being able to search for it, it is the conductor's duty to aid him to find it.[8]

Texas the ticket office must open for thirty minutes before the departure of a train: Missouri etc. R. Co. *v.* McClanahan, 66 Tex. 530; 1 S. W. Rep. 576.

1 Chicago etc. R. Co. *v.* Parks, *supra; aliter*, of course, where the passenger does not use reasonable diligence himself. Indianapolis etc. R. Co. *v.* Kennedy, 3 Am. & Eng. R. R. Cas., 467.

2 Chicago etc. R. Co. *v.* Bogher, 1 Ill. (App.) 472; Pitts. etc. R. Co. *v.* Vandyne, 57 Ind. 576; 26 Am. Rep. 68; Jones *v.* R. Co., 17 Mo. (App.) 158.

3 Bennett *v.* R. Co., 7 Phila. 11; Downs *v.* R. Co., 36 Conn. 287; 4 Am, Rep. 77; Crawford *v.* R. Co., 26 Ohio St. 580; Ripley *v.* New Jersey Trans. Co., 31 N. J. L. 288; People *v.* Caryl, 3 Park. Cr. 326; Baltimore etc. R. Co. *v.* Blocher, 27 Md. 277; State *v.* Campbell, 32 N. J. L. 309; Hibbard *v.* R. Co., 15 N. Y. 455; Loring *v.* Aborn, 4 Cush. 608; Pull. Pal. Car Co. *v.* Reed, 75 Ill. 125; 20 Am. Rep. 232; Willets *v.* R. Co., 14 Barb. 585; Standish *v.* Narragansett Co., 111 Mass. 512; 15 Am. Rep. 66; De Lucas *v.* R. Co., 38 La. Ann. 930.

4 Ill. Cent. R. Co. *v.* Whittemore, 43 Ill. 420; 92 Am. Dec. 138; North etc. R. Co., *v.* Page, 22 Barb. 130; Vedder *v.* Fellows, 20 N. Y. 126.

5 State *v.* Thompson, 20 N. H. 251; Pittsburgh etc. R. Co. *v.* Hennigh, 39 Ind. 509.

6 Standish *v.* R. Co., 111 Mass. 512; 15 Am. Rep. 66; Jerome *v.* Smith, 48 Vt. 280; 21 Am. Rep. 125; Duke *v.* R. Co., 14 U. C. Q. B. 369, 377; Crawford *v.* R. Co., 26 Ohio St. 580; Downs *v.* R. Co., 36 Conn. 287; 4 Am. Rep. 77; Cresson *v.* R. Co., 11 Phila. 597.

7 Curtis *v.* R. Co., 12 U. C. C. P. 89; Maples *v.* R. Co., 38 Conn. 557; 9 Am. Rep. 434; Int. etc. R. Co., *v.* Wilkes, 68 Tex. 617; 2 Am. St. Rep. 515; 5 S. W. Rep. 491; Hayes *v.* R. Co., 30 Alb. L. J. 469.

8 Louisville etc. R. Co, *v*, Fleming, 14 Lea, 128.

In one case, the plaintiff took a train, depending on a friend taking passage at the same time to pay his fare, but that person got into another car. When the conductor demanded his ticket, he told him he had neither ticket nor money, but would go into the other car and get the money from his friend. The train was midway between the stations. The conductor refused to delay, and put him off. It was held that the ejection was illegal.[1] The court said that where there is no refusal to pay fare or produce a ticket, but for some reason, such as the mislaying of the ticket or the loss of his pocketbook, a prompt response to the conductor's demand is impossible, a reasonable opportunity must be given the passenger to look for what is mislaid or lost, or provide other means of payment; and the law does not require every one to have possession of his own ticket, or the friend who has it with him to be near by at the hazard of expulsion. And the courts will not permit the carrier to strictly enforce the rule in an unreasonable manner where satisfactory evidence is produced to account for the failure to have the ticket.[2]

The grounds upon which such regulations are sustained are that they prevent frauds upon the carrier both by the public and the carrier's servants, and fa-

1 Clark *v.* R. Co., 91 N. C. 506; 49 Am. Rep. 647.

2 Hibbard *v.* R. Co., 15 N. Y. 455, per Comstock, J., As in Pull. Pal. Car Co., *v.* Reed, 75 Ill. 125; 20 Am. Rep. 232, where the plaintiff purchased a ticket for a berth in a sleeping-car, which he exhibited to the porter, who showed him his berth, which the plaintiff made preparations to occupy, and afterwards the ticket was demanded by the conductor of the car, but could not be found. The train had not yet left the station where the ticket was purchased, and the plaintiff procured from the defendant's agent a writing certifying that he had paid for the berth he was occupying. The conductor refused to accept this or any explanations in lieu of the ticket, and he was ejected. So in St. Louis etc. R. Co. *v.* Dalby, 19 Ill. 353, where the ticket agent, having no tickets on hand, gave the passenger a receipt for the money, which the conductor refused to recognize. So in Maples *v.* R. Co., 38 Conn. 557; 9 Am. Rep. 434, where the conductor knew that the person unable to produce his ticket was a commuter, and that it had not expired.

cilitate the dispatch of business and the speedy carriage of passengers.

§ 263. **Other Regulations as to Tickets.**—Regulations are reasonable that coupons will not be accepted unless detached by or in the presence of the conductor,[1] forbidding conductors from passing any one on half-fare tickets, unless those exhibiting them shall carry a permit from the proper officer of the road;[2] requiring passengers, before commencing the return journey, to be identified by the proper officer and have their tickets stamped;[3] requiring passengers who break their journey to have their tickets indorsed by the conductor.[4]

§ 264. **Concerning Use of Carrier's Premises.**—A regulation is valid and reasonable excluding from the carrier's premises, persons not passengers or not having tickets;[5] so is a rule forbidding hackmen, peddlers, express-men, and loafers from entering a passenger-room at the station.[6] A passenger may not be ejected from a station on the mere whim of the person in charge.[7]

§ 265. **Classification of Passengers.**—The regulations of a common carrier classifying or discriminat-

1 Boston etc. R. Co. *v.* Chipman, 146 Mass. 107; 4 Am. St. Rep. 293; Norfolk etc. R. Co. *v.* Wysor, 82 Va. 250. But a technical violation of it—as where the conductor can see that the coupon is from the ticket—will not justify him in refusing to accept the coupon, though a willful refusal of the passenger to show the ticket and allow the conductor to examine the case will: Louisville etc. R. Co. *v.* Harris, 9 Lea, 180; 42 Am. Rep. 668; Wightman *v.* R. Co., 73 Wis. 169; 9 Am. St. Rep. 778; 40 N. W. Rep. 689.

2 Goetz *v.* R. Co., 50 Mo. 472.

3 Mosher *v.* R. Co., 17 Fed. Rep. 880; 23 *Id.* 326; 127 U. S. 390.

4 Beebe *v.* Ayers, 28 Barb. 275; Dunphy *v.* R. Co., 42 N. Y. (S. C.) 128.

5 Jencks *v.* Coleman, 2 Sumn. 221; Com. *v.* Power, 7 Metc, 596; 41 Am. Dec. 465; Harris *v.* Stevens, 31 Vt. 79; 73 Am. Dec. 337; Barker *v.* R. Co., 18 Com. B. 46; Markham *v.* Brown, 8 N. H. 523; 31 Am. Dec. 209; Landrigan *v.* State, 31 Ark. 50; 25 Am. Dec. 547.

6 *Id.* But a hackman with a check for baggage may enter the baggage-room. Summitt *v.* State, 8 Lea, 415; 41 Am. Rep. 637.

7 As in this case for spitting on the floor, People *v.* McKay, 46 Mich. 439; 41 Am. Rep. 169; 9 N. W. Rep. 486.

ing between different passengers or designating the character of accommodations provided and designating the persons who may travel upon or use them, have regard usually to (*a*) sex, (*b*) race, or (*c*) special accommodations.

(a) The carrier has a right to reserve a car or other portion of his vehicle for women and men accompanying them.[1]

(b) Under the statutes and decisions of some of the States, a carrier can make no rule prohibiting a passenger of one color or race from going where another passenger of a different color or race would be permitted, under the same conditions, to go.[2] In others the courts see no injustice or illegality in such a discrimination.[3] Again, in at least seven of the former slave holding States,[4] common carriers are required by statute to provide separate cars having equal accommodation for whites and blacks.[5] And in the absence of a statute specifically inhibiting discrimination of any kind, it seems to be now settled that while all passengers are entitled to *equal* accommodation, yet these words do not mean *identical* accommodations, and that common carriers may provide separate vehicles or separate parts of the same vehicle for white passengers exclusively, provided they furnish equally good

1 Chicago etc. R. Co. *v.* Williams, 55 Ill. 185; 8 Am. Rep. 641; Bass *v.* R. Co., 36 Wis. 450; 17 Am. Rep. 495; 39 Wis. 636; 42 Wis. 654; Peck *v.* R. Co., 70 N. Y. 587; State *v.* Overton, 24 N. J. L. 435, 441; 61 Am. Dec. 671; Pittsburgh etc. R. Co. *v.* Hinds, 53 Pa. St. 572; 91 Am. Dec. 224; Memphis etc. R. Co. *v.* Benson, 85 Tenn. 627; 4 Am. St. Rep. 776; 4 S. W. Rep. 5; Brown *v.* R. Co., 7 Fed. Rep. 51; Marquette *v.* R. Co., 33 Ia. 562; provided there is room for the other passengers elsewhere. Bass *v.* R. Co., *supra.*

2 Coger *v.* Packet Co., 37 Iowa, 145; De Cuir *v.* Benson, 27 La. Ann. 1. This statute was held void as a regulation of commerce in Hall *v.* De Cuir, 95 U. S. 485; Central R. Co. *v.* Green, 86 Pa. St. 427.

3 West Chester R. Co. *v.* Miles, 55 Pa. St. 200; 93 Am. Dec. 744; Goines *v.* McCandless, 4 Phila. 255; Day *v.* Owen, 5 Mich. 520; 72 Am. Dec. 62; Chesapeake etc. R. Co. *v.* Wells, 4 S. W. Rep. 5 (Tenn.).

4 Ala., Ark., Fla., La., Miss., Tenn., Tex.

5 2 Stim. Am. St. L. § 8850.

accommodations elsewhere for their black passengers.[1] Obviously, a colored passenger is entitled to the same protection against other passengers as a white passenger.[2]

(c) The carrier may provide special accommodations as a chair or parlor car, and refuse to allow persons to ride thereon who refuse to pay extra fare,[3] or he may restrict such cars to passengers to distant points.[4] So, he may restrict passage on certain fast trains, to persons holding a special kind of ticket,[5] or on shipboard, set apart a table for the special use of the officers of the boat.[6]

§ 266. **Passengers on Freight Trains.**—The carrier may refuse to carry on conveyances not devoted to the carriage of passengers; as, for example, freight trains;[7] unless he holds himself out as a carrier on such trains.[8] Therefore, not only regulations that no passengers shall be carried on such trains, but that no one shall be carried who does not have tickets of a particular description,[9] or who does not first procure

1 Green *v.* The Bridgeton, 9 Cent. L. J. 207; Chicago etc. R. Co. *v.* Williams, 55 Ill. 185; Gray *v.* R. Co., 11 Fed. Rep. 687; Houck *v.* R. Co., 38 Fed. Rep. 276; The Sue, 22 Fed Rep. 843; Logwood *v.* R. Co., 23 Fed. Rep. 318; Murphy *v.* R. Co., 23 Fed. Rep. 637; Coger *v.* Packet Co., 37 Ia. 145; Day *v.* Owen. *supra*; Heard *v.* R. Co., 2 Inter. Com. Rep. 508; 1 *Id.* 314; Louisville etc. R. Co. *v.* State, 2 *Id.* 615; 133 U. S. 587; Smith *v.* Chamberlain, 17 S. E. Rep. 371; *ex parte* Plessy, 45 La. Ann. 100; 11 South. Rep. 948; Anderson *v.* R. Co., 62 Fed. Rep. 46.

2 Richmond etc. R. Co. *v.* Jefferson, 16 S. E. Rep. 69 (Ga.).

3 Wright *v.* R. Co., 20 Pac. Rep. 740; Marquette *v.* R. Co., 33 Ia. 562.

4 St. Louis etc. R. Co. *v.* Hadly, 17 S. W. Rep. 711 (Ark.).

5 Nolan *v.* R. Co., 41 N. Y. (S. C.) 541; Lake Shore etc. R. Co. *v.* Rosenweig, 113 Pa. St. 510.

6 Ellis *v.* Narragansett Co., 111 Mass. 146.

7 Ill. Cent. R. Co. *v.* Nelson, 59 Ill. 112; Ill. Cent. R. Co. *v.* Johnson, 67 Ill. 314; Arnold *v.* R. Co., 83 Ill. 273; 25 Am. Rep. 386; Eaton *v.* R. Co., 57 N. Y. 382; Murch *v.* R. Co., 29 N. H. 9; Houston etc. R. Co. *v.* Moore, 49 Tex. 31; Chicago etc. R. Co. *v.* Randolph, 53 Ill. 516; Thomas *v.* R. Co., 72 Mich. 255.

8 Flinn *v.* R. Co., 1 Houst. 469; McGee *v.* R. Co., 92 Mo. 208; 1 Am. St. Rep. 706; Chicago etc. R. Co. *v.* Flagg, 43 Ill. 364; 92 Am. Dec. 133; Hazard *v.* R. Co., 1 Biss. 503; Mobile etc. R. Co. *v.* McArthur, 43 Miss. 180.

9 Faukner *v.* R. Co., 55 Ind. 369; Ill. Cent. R. Co. *v.* Nelson, 59 Ill. 110; Dunlap *v.* R. Co., 35 Minn. 203; or a written permit, Thomas *v.* R. Co., 73 Mich. 355; 40 N. W. Rep. 463.

tickets at the company's office, are reasonable;[1] provided the office is kept open or proper facilities are given for such purpose.[2]

In the case of the freight train, the carrier is not obliged to adopt all the appliances and devices which the law exacts of all carriers of passengers on passenger trains, in the course of the transit or in the receiving and landing of passengers, for their safety and comfort.[3] But so far as are involved care and attention to the working of the locomotive and machinery, the cars and their running gear, and a strict attention to the condition of the road bed, and objects upon its track and the like, there is no recognized distinction between the passenger coach and the freight car on which a passenger is being carried.[4]

Though there be a rule to the contrary, persons allowed to ride, and whose fare is accepted or not de-

1 Cleveland etc. R. Co. *v.* Bartram, 11 Ohio St. 457; St. Louis etc. R. Co. *v.* Myrtle, 51 Ind. 506; Lake Shore etc. R. Co. *v.* Greenwood, 79 Pa. St. 373; Evans *v.* R. Co., 56 Ala. 246; 28 Am. Rep. 771; Kansas etc. R. Co. *v.* Kessler, 18 Kan. 523; Illinois etc. R. Co. *v.* Johnson, 67 Ill. 312; Toledo etc. R. Co. *v.* Patterson, 63 Ill. 304; Illinois etc. R. Co. *v.* Sutton, 42 Ill. 438; 92 Am. Dec. 81; Illinois etc. R. Co. *v.* Nelson, 59 Ill. 110; Law *v.* R. Co., 32 Iowa, 534; Indianapolis etc. R. Co. *v.* Rinard, 46 Ind. 293; Burlington etc. R. Co. *v.* Rose, 11 Neb. 177; 8 N. W. Rep. 433; Brown *v.* R. Co., 38 Kas. 634; 16 Pac. Rep. 942; Indianapolis etc. R. Co. *v.* Kennedy, 77 Ind. 507.

2 St. Louis etc. R. Co. *v.* Myrtle, 51 Ind. 566; Evans *v.* R. Co., 56 Ala. 246; 28 Am. Rep. 771; Chicago etc. R. Co. *v.* Flagg, 43 Ill. 364; 92 Am. Dec. 133; Illinois etc. R. Co. *v.* Johnson, 67 Ill. 312; Illinois etc. R. Co. *v.* Sutton, 42 Ill. 438; 92 Am. Dec. 81.

3 Shoemaker *v.* Kingsbury, 79 U. S. 369; Murch *v.* R. Co., 29 N. H. 42; 61 Am. Dec. 631; Hazard v. R. Co. *post*; Indianapolis etc. R. Co. *v.* Horst, *post*; Indianapolis etc. R. Co. *v.* Beaver, 41 Ind. 493; Oviatt *v.* R. Co., 43 Minn. 300; 45 N. W. Rep. 436; Arkansas etc. R. Co. *v.* Canman, 52 Ark. 517; 13 S. W. Rep. 280; Crane *v.* R. Co., 84 Ga. 651; Wallace *v.* R. Co., 98 N. C. 494; 4 S. E. Rep. 503; Hobbs *v.* R. Co., 49 Ark. 357; 5 S. W. Rep. 586; Browne *v.* R. Co., 108 N. C. 34; 12 S. E. Rep. 958.

4 Shoemaker *v.* Kingsbury, 79 U. S. 369; Hazard *v.* R. Co., 1 Biss. 503; 26 Ill. 373; Indianapolis etc. R. Co. *v.* Horst, 93 U. S. 291; Ohio etc. R. Co. *v.* Dickerson, 59 Ind. 317; Edgerton *v.* R. Co., 35 Barb. 389; 39 N. Y. 227; Ohio etc. R. Co. *v.* Muhling, 30 Ill. 9; 81 Am. Dec. 336; Ohio etc. R. Co. *v.* Selby, 47 Ind. 471; 17 Am. Rep. 719; Flinn *v.* R. Co., 1 Houst. 469; Dunn *v.* R. Co., 58 Me. 187; 4 Am. Rep. 267; New York etc. R. Co. *v.* Doane, 115 Ind. 435; 7 Am. St. 451; 17 N. E. Rep. 913; McGee *v.* R. Co., 92 Mo. 208; 4 S. W. Rep. 739; Wagner *v.* R. Co., 97 Mo. 512; 10 S. W. Rep. 486; Mo. Pac. R. Co. *v.* Holcomb, 44 Kas. 332; 24 Pac. Rep. 467; Woolery *v.* R. Co., 107 Ind. 381; 8 N. E. Rep. 226; Sutherland *v.* R. Co., 28 N. Y. (S.) 211; Browne *v.* R. Co., 108 N. C. 34; 12 S. E. Rep. 958; Olson *v.* R. Co., 45 Minn. 536; 48 N. W. Rep. 445.

manded on such trains, are passengers,[1] and this is clear where the passenger has no knowledge of the rule, for such a regulation is not to be presumed to be known to the passenger;[2] and as it is customary in many parts of this country for railroads to carry passengers on freight trains,[3] the fact alone that the train is a freight train, does not *per se* declare to the passenger that it is not such a train as he is invited to take passage upon.[4] Even when he knows of the general regulation, yet if the conductor or servant in charge of the train permits him to ride, and he does so, assuming that the conductor has the authority, notwithstanding the regulation, to do so, he is a passenger. A person invited or permitted by a conductor to ride on a freight train, may know the general rules of the company forbidding passenger traffic on such trains, but under the circumstances of time and place such as the usages of the company, make up and appearance of the train,[5] and the acts of the conductor in charge thereof, he may have good reason to believe that the conductor in that particular case had the right to do as he had done; the act being within the actual or apparent line of his duty.[6] The conductor having wide authority in the running of the

1 Dunn *v.* R. Co., 58 Me. 192; 4 Am. Rep. 267; Creed *v.* R. Co., 86 Pa. St. 139; 27 Am. Rep. 699; Hanson *v.* R. Co., 38 La. Ann. 111; 58 Am. Rep. 162; Alabama etc. R. Co. *v.* Yarborough, 84 Ala. 238; 3 South Rep. 447; East Saginaw R. Co. *v.* Bohn, 27 Mich. 503; Lucas *v.* R. Co., 33 Wis. 41; Washburn *v.* R. Co., 3 Head, 638; New York etc. R. Co. *v.* Ball, 52 N. J. (L.) 283; 21 Atl. Rep. 1052.

2 Dunn *v.* R. Co., 58 Me. 187; Wagner *v.* R. Co., 97 Mo. 512; 10 S. W. Rep. 486; St. Joseph etc. R. Co. *v.* Wheeler, 25 Kas. 585; 19 Pac. Rep. 461; Wilton *v.* R. Co., 107 Mass. 108; 125 Mass., 129. Brown *v.* R. Co., 38 Kas. 63; 16 Pac. Rep. 942.

3 Berry *v.* R. Co., 25 S. W. Rep. 229 (Mo.), per *Martin, J.*

4 As is incorrectly assumed in Eaton *v.* R. Co., 57 N. Y. 382; 15 Am. Rep. 513; Texas etc. R. Co. *v.* Black, 27 S. W. Rep. 118 (Tex.)

5 See International etc. R. Co. *v.* Cock, 68 Tex. 713; 5 S. W. Rep. 635; Powers *v.* R. Co., 153 Mass. 188; 26 N. E. Rep. 446; Ill. Cent. R. Co. *v.* Meachan, 19 S. W. Rep. 232.

6 Martin, J., in Berry *v.* R. Co., 25 S. W. Rep. 225; Files *v.* R. Co., 149 Mass. 201; 21 N. E. Rep. 311; Powers *v.* R. Co., 153 Mass. 188; 26 N. E. Rep. 446.

train, his position being not unlike that of the captain of a vessel, the pasenger may well have relied upon his authority, where no such inference could be drawn were the person giving the permission a brakeman or other servant having no charge over the train.[1]

The question is, after all—as we have already seen in the case of a passenger on an ordinary train, who rides free by the consent of the conductor or other person in charge—one of good faith on the part of the passenger based on the passenger's knowledge of the rules and whatever comes to him at the time to lead him to believe that the carrier's servant has a right to waive those rules.[2] If the servant had expressly stated that he had no authority, the presumption against the passenger would be very strong;[3] but even then it would not be conclusive. Other circumstances would be still stronger against the passenger, as where he tips or bribes the conductor, to allow him to ride.[4]

§ 267. **Dangerous and Disorderly Passengers.**— The carrier has power (and it is likewise his duty[5]) to expel from the vehicle, or to confine therein, passengers whose presence is either dangerous or extremely offensive to other passengers; and in the case of those whose presence he has reason to believe is likely to result in injury or annoyance to his other passengers, without even waiting for an overt act of violence.[6] This class will include gamblers, pickpockets and sneak

1 Candiff *v.* R. Co., 42 La. Ann. 477; 7 South Rep. 601; Hansen *v.* R. Co., 38 La. Ann. 111; International etc. R. Co. *v.* Prince, 77 Tex. 560; 14 S.W. Rep. 171; McGee *v.* R. Co., 92 Mo. 208; 4 S. W. Rep. 739; Muelheusen *v.* R. Co., 91 Mo. 344; 2 S. W. Rep. 315.

2 Toledo etc. R. Co. *v.* Brooks, 81 Ill. 245.

3 Gulf etc. R. Co. *v.* Campbell, 76 Tex. 174; 13 S. W. Rep. 19; Houston etc. R. Co. *v.* Moore, 49 Tex. 31.

4 Can. Pac. R. Co. *v.* Johnson, L. R. 3 Q. B. 213 (Quebec); Powers *v.* R. Co., 153 Mass. 188; 26 N. E. Rep. 446.

5 See § 302.

6 Vinton *v.* R. Co., 11 Allen. 304; Sullivan *v.* R. Co., 148 Mass. 169; 18 N. E. Rep. 617; see Thomp. Carr. Pass., 382.

thieves,[1] persons grossly intoxicated,[2] or one verging on delirium tremens,[3] or a disorderly person.[4] While mere bad manners would not be a sufficient ground,[5] yet the use of profane and indecent language, especially in the presence of women would.[6] So as to one unable to sit up and vomiting, even though not from the effect of intoxicating liquors.[7] The carrier will be responsible for the act of his servant in expelling a passenger from his vehicle under a mistake of fact or of judgment as to the misconduct of the latter.[8] And a father cannot be removed on account of the misbehavior of a grown son.[9]

§ 268. **Notice of Regulations.**—There are some rules and regulations of the carrier which the passenger is bound to know, and if he has not made himself acquainted with them, he cannot set up want of knowledge on his part where the carrier's servants attempt to enforce them.[10] The most common of this class of regulations are those regarding the times of running of trains or other conveyances and the places

1 Thurston *v.* R. Co. 4 Dill. 321; Smith *v.* Wilson, 31 How. Pr. 272; and see Thomp. Carr. Pass., 302.

2 Vinton *v.* R. Co., 11 Allen, 304; 87 Am. Dec. 714; Murphy *v.* R. Co., 118 Mass. 228; State *v.* Ross, 26 N. J. L. 224; Hendricks *v.* R. Co., 12 Jones & S. 8; Railroad Co. *v.* Velleley, 32 Ohio St. 345; 30 Am. Rep. 601; Balt. etc. R. Co. *v.* McDonald, 68 Ind. 316; Sullivan *v.* R. Co., 148 Mass. 119; 18 N. E. Rep. 617; Cinn. etc. R. Co. *v.* Cooper, 120 Ind. 469; 22 N. E. Rep. 340. Slight intoxication is not a good ground for ejection: Putnam *v.* R. Co., 55 N. Y. 108; Pitts. etc. R. Co. *v.* Vandyne, 57 Ind. 576; 26 Am. Rep. 68.

3 King *v.* R. Co., 22 Fed. Rep. 413; Atchison etc. R. Co. *v.* Weber, 33 Kan. 543; 52 Am. Rep. 543; 6 Pac. Rep. 877.

4 Chicago etc. R. Co. *v.* Griffin, 68 Ill. 499.

5 Putnam *v.* R. Co., *supra*; Prendergast *v.* Compton, 8 C. & P. 454.

6 Chicago etc. R. Co. *v.* Griffin, 68 Ill. 497.

7 Lemont *v.* R. Co., 1 Mackey, 180; 47 Am. Rep. 238.

8 Higgins *v.* Watervliet Tp. Co., 46 N. Y. 23; 7 Am. Rep. 293; Connolly *v.* R. Co., 41 La. Ann. 63; 5 South. Rep. 259; 6 Id. 526; but see Lemont *v.* R. Co., 1 Mackey, 180; 47 Am. Rep. 238.

9 Louisville etc. R. Co. *v.* Maybin, 66 Miss. 93; 5 South. Rep. 401.

10 Cheney *v.* R. Co., 11 Metc. 121; 45 Am. Dec. 190; Dietrich *v.* R. Co., 71 Pa. St. 432; McRae *v.* R. Co., 88 N. C. 526; 43 Am. Rep. 745; State *v.* Overton, 24 N. J. (L.) 435; Terry *v.* R. Co., 13 Hun. 359; Gulf, etc., R. Co. *v.* Moody, 30 S.W. Rep. 574 (Tex.).

at which they stop.[1] But regulations as to the time within which a ticket must be used,[2] as to what classes of persons it is good for,[3] as to what kinds of trains it is good upon,[4] or that tickets are only good for continuous passage,[5] must be brought home to the passenger.

If the carrier's known rules are changed by him, he must give notice of the change to the passenger whom he seeks to bind by them.[6] A passenger need not take notice of a rule which contravenes a statute.[7]

§ 269. **Persons under Physical or Mental Disability.** — Towards passengers affected by a disability, either physical or mental, a degree of care is due by the carrier in proportion to the liability to injury from the want of it—provided, of course, that the servants of the carrier have notice of such disability.[8] This rule has been applied to the case of very young children,

1 Duling *v.* R. Co., 65 Md. 120; Wells *v.* R. Co., 6 South. Rep. 737 (Miss.); Chicago etc. R. Co. *v.* Randolph, 53 Ill. 510; Pitts. etc. R. Co. *v.* Nuzum, 50 Ind. 141; 19 Am. Rep. 707; Ohio etc. R. Co. *v.* Applewhite, 52 Ind. 540; Chicago etc. R. Co. *v.* Bills, 104 Ind. 13; Fink *v.* R. Co., 4 Lans, 147; Logan *v.* R. Co., 77 Mo. 663; Beauchamp *v.* R. Co., 56 Tex. 307; Atchison etc. R. Co. *v.* Gants, 38 Kas. 608; 17 Pac. Rep. 54.

2 Penn. R. Co. *v.* Spicker, 105 Pa. St. 142.

3 Chicago etc. R. Co. *v.* Chisholm, 79 Ill. 584; Maroney *v.* R. Co., 106 Mass. 157; 8 Am. Rep. 305.

4 See *ante* § 267 *freight trains.*

5 Cheney *v.* R. Co., *ante*; Drew *v.* R. Co., 51 Cal. 425; Oil Creek etc. R. Co. *v.* Clark, 72 Pa. St. 231.

6 Lake Shore etc. R. Co. *v.* Greenwood, 79 Pa. St. 373; Kansas etc. R. Co. *v.* Kessler, 18 Kas. 523; Lane *v.* R. Co., 5 Lea. 124; Burnham *v.* R. Co., 63 Me. 298. 18 Am. Rep. 220; Pitts. etc. R. Co. *v.* Berryman, 36 N. E. Rep. 728 (Ind.).

7 Robinson *v.* R. Co., 38 Pac. Rep. 94, 722 (Cal.).

8 Sheridan *v.* R. Co., 36 N. Y. 39; 93 Am. Dec. 490; 34 How. Pr. 217; Giles *v.* R. Co., 37 U. C. Q. B. 360, 369; Pittsburgh etc. R. Co. *v.* McClurg, 56 Pa. St. 294; Columbus etc. R. Co. *v* Powell, 40 Ind. 37; Willetts *v.* R. Co., 14 Barb. 585; Toledo etc. R. Co. *v.* Baddeley, 54 Ill. 19; 5 Am. Rep. 71; Ridenhour *v.* R. Co., 102 Mo. 270; 14 S. W. Rep. 760; St. Louis etc. R. Co. *v.* Finley, 79 Tex. 85; 15 S. W. Rep. 266; Wardle *v.* R. Co., 35 La. Ann. 204; Hickman *v.* R. Co., 91 Mo. 433; 4 S. W. Rep. 127; East Line etc. R. Co. *v.* Rushing, 69 Tex. 306; 6 S. W. Rep. 834; Shenandoah etc. R. Co. *v.* Moose, 83 Va. 827; 3 S. E. Rep. 796.

9 Toledo etc. R. Co. *v.* Baddeley, *supra*; Willetts *v.* R. Co., 14 Barb. 485; New Orleans etc. R. Co. *v.* Statham, 42 Miss. 607; 97 Am. Dec. 478; McGinney *v.* R. Co., 7 Manitoba, 151.

especially when traveling alone,[1] aged and feeble, sick or crippled passengers,[2] insane persons,[3] and intoxicated persons.[4]

In *Lake Shore R. Co.* v. *Salzman*,[5] the plaintiff was returning on a train with a number of his brother Odd Fellows from the dedication of a building at Toledo, when A, one of the number, and a fellow passenger, who occupied the seat immediately in front of plaintiff, was taken sick, and was suffering great pain, occasioned from scrotal hernia. Some of the friends of the sick man went for a physician, also on the train. The doctor attended A, but was unable to reduce the hernia in the seat where the sick man was. He said it was necessary to find some place where the man could be put on his back, and his lower clothes removed. The passenger car was filled principally with ladies, and that was not a proper place to expose his person. Thereupon, the conductor was called in, and told of the trouble, and asked if there was not some place on the train where they could take the man and lay him on his back. The conductor said there was a caboose at the rear of the train, having seats at the side, and also a cot, where they could take the man when the train stopped at the next station. Afterwards, the train having stopped, and the plaintiff and several other passengers being in the act of carrying A into the caboose, the plaintiff was injured by falling between the

1 Hemmingway *v.* R. Co., 72 Wis. 42; 7 Am. St. Rep. 823; 37 N. W. Rep. 804; Brennan *v.* R. Co., 45 Conn. 284; 29 Am. Rep. 679; Indianapolis etc. R.Co. *v.* Pitzer, 109 Ind. 179; 58 Am. Rep. 387; 6 N. E. Rep. 310; 10 Id. 70; Metropolitan etc. R. Co. *v.* Moore, 83 Ga. 453; 10 S. E. Rep. 730; Redenhour *v.* R. Co., 102 Mo. 270; 14 S. W. Rep. 760.

2 Balt. etc. R. Co. *v.* Leafley, 65 Md. 571; Jacksonville etc. R. Co. *v.* Chappell, 21 Fla. 175; Paddock *v.* R. Co., 37 Fed Rep. 841; Connolly *v.* R. Co., 41 La. Ann. 57; 5 South Rep. 259; 6 Id. 526.

3 Willetts *v.* R. Co., 14 Barb. 485.

4 Haley *v.* R. Co., 21 Iowa, 15; Milliman *v.* R. Co., 6 Thomp. & C. 585; 66 N. Y. 642; Maguire *v.* R. Co., 115 Mass. 239; Whalen *v.* R. Co., 60 Mo. 323; Giles *v.* R. Co., 36 U. C. Q. B. 360; Cincinnati etc. R. Co. *v.* Cooper, 120 Ind. 467; 22 N. E. Rep. 340; Johnson *v.* R. Co., 16 South. Rep. 75 (Ala.).

5 40 N. E. Rep. 891 (Ohio).

car and the caboose, the platforms being of different heights, and there being a space between them. A verdict in his favor, against the railroad, was affirmed by the Supreme Court, Burket, J., saying: "On the part of the defendant, it is urged that the conductor had no control over plaintiff to order him to do anything in aid of the sick man; that, as plaintiff was not bound to obey the orders of the conductor in that regard, whatever he did was purely voluntary on his part, and that he assumed all the risks incident to his voluntary acts; and that the conductor had no authority to bind the company in giving orders as to the sick man. On part of plaintiff, it is urged that there is no difference in the obligation of the company, whether the removal of the sick man was undertaken by the direction and order of the conductor, or simply by his permission; that the duty devolved upon the company to take reasonable care of the sick passenger on its train, and that, when other passengers assisted the officers of the train in the performance of that duty, the company owed to such assisting passengers, the obligation of ordinary care to prevent injury to them. If no duty devolved upon the company to take reasonable care of the passenger who became sick on its train, then neither the order, direction, nor permission bound the company, because such order, direction or permission was not within the scope of his employment, and not in the line of his duties. The case, therefore, turns upon the question whether or not a duty devolves upon a railroad company to take reasonable care of passengers who become sick after entering its cars? In travel by ship, care and medical attendance are always provided by the company, as one of the necessities of the journey. In travel by rail no such necessity exists, and therefore, a railroad company is under no obliga-

tion to furnish hospitals on wheels, or physicians or nurses to attend the sick on their journeys. But without hospitals, and without physicians and nurses of their own, still much can be done to alleviate the pains and aches of a sick passenger. While the train is in motion, the passenger is utterly helpless as to aid, except from those on the train. His fellow passengers owe him no duty except humanity. The alternative is presented of being cared for by his fellow passengers, by the company, or to writhe in pain and sickness until relieved by death or the end of his journey. By taking passage and paying his fare, the relation of carrier and passenger is established between the company and himself, and, as he is under the control of the company for many purposes, and debarred by the rapid movement of its trains from receiving aid from the outside world, it would seem to follow as a necessity of the situation, that those who have received his money, and are thus rapidly transporting him, should assume the obligation of taking reasonable care of him in case of sickness while on the train. This obligation is on the company, not only for the benefit of the sick person, but also for the comfort, and sometimes the safety, of the other passengers. A sick person, by his cries and moans, may so annoy the other passengers as to require his removal to a separate department, or from the train. In case of smallpox or cholera, or other contagious disease, the comfort and safety of the other passengers would demand the early removal of the afflicted passenger from the train. The company would in such case be charged with the duty of removal, and reasonable care thereafter, until the afflicted person could be otherwise cared for. It is, therefore, clear that the company owed a duty to the sick passenger, and was under obligation to take rea-

sonable care of him—such care as was fairly practicable with the facilities at hand, without unreasonable delay of the train, or discomfort to the other passengers. The plaintiff, assisting in the care of such sick person by direction or permission of those in charge of the train, was entitled to at least ordinary care on their part for his protection from injury."

In a New York case, a woman with a child in her arms, while alighting from a car, caught upon a nail projecting from the car platform, a steel hoop of a hoop-skirt which she wore as part of her clothing, and was thrown upon the ground, dragged some distance, and injured. The court said that if hoop-skirts are worn by such passengers as the road was in the habit of conveying, the carrier was bound to provide for the safety of the passengers wearing that kind of a garment with as much caution as prudent and cautious persons would be found to exercise.[1]

[1] Paulin *v.* R. Co., 61 N. Y. 621.

CHAPTER XVIII.

THE PASSENGER'S BAGGAGE.

SECTION 270. Right of Passenger to Baggage.
271. Carrier of Baggage an Insurer.
272. What is Baggage.
273. Rule in last Section Modified by Usage.
274. Carrier may Refuse to Carry—when.
275. Effect of Failure to State Kind.
276. Effect of Failure to State Value.
277. May Enquire as to Contents of Trunk.
278. Knowledge of Carrier that Articles are not Baggage.
279. Owner of Baggage must be Passenger.
280. Need not Accompany Baggage.
281. When Liability of Carrier Begins.
282. Before Purchase of Ticket.
283. Baggage left without Notice—Custom.
284. The Baggeman and his Powers.
285. The Baggage Check.
286. When Liability of Carrier Ends.
287. Liability of Carrier as Warehouseman.
288. As to Connecting Carriers.
289. Where Baggage in Custody of Passenger.

§ 270. **Right of Passenger to Baggage.**—The right of the passenger to take with him his baggage is one which was accorded by the carrier himself in the earliest era of the business of carrying passengers for hire—a kind of inducement to attract travelers, like an easy seat or a warm car. As it has always been for the obvious interest of carriers of passengers to encourage travel by permitting the passenger to take with him what he may require for his personal use on his journey, this privilege of a reasonable amount of baggage has ripened into a right like any other right

of reasonable accommodation.[1] The contract to carry the passenger includes, as an incident thereto, the carriage of his baggage without any other agreement and without the payment of any additional fare.[2]

The carrier is obliged to carry only a reasonable quantity, both as to value and weight. But unless he is careful to restrict his liability in this respect,[3] or the statutes of the State prescribe a limitation,[4] his common law liability as to quantity or value is unlimited, provided the things are baggage within the legal meaning of that term.[5]

§ 271. **Carrier of Baggage an Insurer.**—The policy of the law made, as we have seen, common carriers insurers of the goods they carried, with a view to preventing fraudulent combinations, which, if the law had

1 Niagara Bk. *v.* Brown, 9 Wend. 116.

2 Orange Co. Bk. *v.* Brown, 9 Wend. 85; 24 Am. Dec. 129; Camden etc. R. Co. *v.* Burke, 13 Wend. 611; 28 Am. Dec. 489; Hollister *v.* Nowlen, 19 Wend. 236; Cole *v.* Goodwin, 19 Wend. 258; Dexter *v.* Syracuse etc. R. Co., 42 N. Y. 329; Hawkins *v.* Hoffman, 6 Hill, 586; 41 Am. Dec. 767; Glasco *v.* R. Co., 36 Barb. 561; Needles *v.* Howard, 1 E. D. Smith, 60; Fairfax *v.* R. Co., 37 N. Y. (S. C.) 528; Hopkins *v.* Westcott, 6 Blatchf. 69; Jordan *v.* R. Co., 5 Cush. 69; 51 Am. Dec. 44; Sasseen *v.* Clark, 37 Ga. 250; Woods *v.* Devin, 13 Ill. 747; 56 Am. Dec. 483; Ind. etc. R. Co. *v.* Cox, 29 Ind. 360; 95 Am. Dec. 640; Warner *v.* R. Co., 22 Ia. 166; 92 Am. Dec. 389; Wilson *v.* R. Co., 56 Me. 60; 96 Am. Dec. 435; Pardee *v.* Drew, 25 Wend. 459; Powell *v.* Myers, 26 Wend. 591; Smith *v.* R. Co., 44 N. H. 325; Cinn. etc. R. Co. *v.* Marcus, 38 Ill. 219; Chicago etc. R. Co., *v.* Fahey, 52 Ill. 81; 4 Am. Rep. 587; Perkins *v.* Wright, 37 Ind. 27; Piexotti *v.* McLaughlin, 1 Strob. 468; 47 Am. Dec. 563; Miss. etc. R. Co. *v.* Kennedy, 41 Miss. 671; Hannibal etc. R. Co. *v.* Swift, 12 Wall. 262; The Elvira Harbeck, 2 Blatch. 336; Hutchings *v.* R. Co., 25 Ga. 61; 71 Am. Dec. 156; Merrill *v.* Grinnell, 30 N. Y. 574; Hirschon *v.* Packet Co., 2 J. & S. 521; McGill *v.* Rowand, 3 Pa St. 451; 45 Am. Dec. 654.

3 Which he may do by refusing to receive it if over weight except the excess be paid for or by proper notices as to the limit of value.

4 By the statutes of Illinois, Texas, Pennsylvania, New York, West Virginia, Missouri and Kansas, passengers are allowed baggage to be transported without other charges than their fare to the extent of 100 pounds. In Michigan, Arkansas, Arizona and Virginia, the limit is 150 pounds; in Nebraska, 200 pounds; in New Hampshire, eighty pounds. 2 Stim. Am. St. Law, §§ 8832 (*b.*) 8852. When not governed by statute, the ordinary allowance in the United States is 150 pounds. In Europe, it is much less. In France, the author has been charged for extra baggage over 50 pounds and in Belgium and Holland over 30 pounds. Only New Hampshire and Pennsylvania, have by statute limited the value of baggage for which the carrier shall be answerable $100 in N. H.; $300 in Pa. 2 Stim. Am. St. Law, § 8852.

5 Railroad Co. *v.* Fraloff *post*; Merrill *v.* Grinnell, 30 N. Y. 618.

been less strict in this particular, would doubtless have arisen between the carrier and the robber; and the policy of the law continues that extensive responsibility in the case of carriers of passengers with regard to the baggage which their passengers carry with them.[1]

The liability of a carrier towards the baggage of a free passenger is only that of a gratuitous bailee;[2] likewise, where the articles carried free, as baggage of a paying passenger, are not really baggage.[3] If the passenger has more baggage than the carrier allows to be carried free, and pays extra on it, the carrier becomes liable for it as a common carrier of goods.[4] But it is still carried as baggage and not as freight, and if the passenger checks the box or trunk as extra baggage, concealing the fact that the articles contained in it are not "baggage," the carrier will not be liable for its loss,

1 Browne Carr. 476; McKee *v.* Owen, 15 Mich. 140; Powell *v.* Myers, 26 Wend. 591; Hollister *v.* Nowlen, 19 Wend. 234; 32 Am. Dec. 455; Cole *v.* Goodwin, 19 Wend. 251; 32 Am. Dec. 470; Macklin *v.* Steamboat Co., 7 Abb. N. S. 238; Laing *v.* Colder, 8 Pa. St. 479; 49 Am. Dec. 533; Bomar *v.* Maxwell, 9 Humph. 620; 51 Am. Dec. 682; Nashville etc. R. Co. *v.* Elliott, 1 Cold. 611; 78 Am. Dec. 506; Mobile etc. R. Co. *v.* Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Dibble *v.* Brown, 12 Ga. 217; 56 Am. Dec. 460; Hannibal etc. R. Co. *v.* Swift, 12 Wall. 262; Fairfax *v.* R. Co., 5 Jones & S. 516; The Elvira Harbeck, 2 Blatchf. 336; Glasco *v.* R. Co., 36 Barb. 557; Perkins *v.* Wright, 37 Ind. 27; Moore *v.* Steamer Evening Star, 20 La. Ann. 402; Wilson *v.* Chesapeake, 21 Gratt. 654; Orange County Bank *v.* Brown, 9 Wend. 85; 24 Am. Dec. 129; Peixotti *v.* McLaughlin, 1 Strob. 468; 47 Am. Dec. 563; Woods *v.* Devin, 13 Ill. 746; 56 Am. Dec. 483; Hawkins *v.* Hoffman, 6 Hill, 586; 41 Am. Dec. 767; Merrill *v.* Grinnell, 30 N. Y. 594; Chamberlain *v.* Western Trans. Co., 45 Barb. 218; Camden etc. R. Co. *v.* Burke, 13 Wend. 611; 28 Am. Dec. 488; Bayliss *v.* Lintott, L. R. 8 Com. P. 345; 42 L. J. Com. P. 119; 28 L. T., N. S.. 666; Blossman *v.* Hooper, 16 La. Ann. 160; Chicago etc. R. Co. *v.* Fahey, 52 Ill. 81; 4 Am. Rep. 587; Dill *v.* R. Co., 7 Rich. 158; 62 Am. Dec. 407; Nashville etc. R. Co. *v.* Elliott, 1 Cold. 611; 78 Am. Dec. 506; Baltimore Packet Co. *v.* Smith, 23 Md. 402; 87 Am. Dec. 575; Roth *v.* R. Co., 34 N. Y. 548; 90 Am. Dec. 736.

2 Flint etc. R. Co. *v.* Weir, 37 Mich. 111; 26 Am. Rep. 477.

3 Mich. etc. R. Co. *v.* Carrow, 73 Ill. 348; 24 Am. Rep. 248; Collins *v.* R. Co., 10 Cush. 506; Stinson. *v.* R. Co., 98 Mass. 83; Alling *v.* R. Co., 126 Mass. 121; Blumenthal *v.* R. Co., 11 Atl. Rep. 605.

4 Sloman *v.* R. Co., 6 Hun. 546; 67 N. Y. 208; Hellman *v.* Holladay, 1 Woolw. 365; Stoneman *v.* R. Co., 52 N. Y. 429; Camden etc. R. Co. *v.* Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481; Glasco *v.* R. Co., 56 Barb. 557; Dibble *v.* Brown, 12 Ga. 218; 56 Am. Dec. 460; Hamburg etc. Packet Co. *v.* Gattman, 127 Ill. 598; 20 N. E Rep. 662.

unless he knew or ought to have known from its appearance, that it was not baggage.[1]

§ 272. **What is Baggage.**—In the law of common carriers of passengers,[2] the term "baggage" means such goods and chattels as the convenience, or comfort (*a*), the taste (*b*), the pleasure (*c*), or the protection (*d*), of passengers generally (*e*) makes it fit and proper for the passenger in question to take with him for his personal use (*f*), according to the habits or wants of the class to which he belongs (*g*), either with reference to the period of the transit or the ultimate purpose of the journey (*h*).

(*a*) The most common class of things falling under the denomination of articles of convenience and comfort, is obviously the wearing apparel of the passenger, whether ready for wear,[3] or simply materials for clothing, and cloth cut into patterns for garments.[4] And for like reasons, a gentleman's dressing case,[5] a watch,[6]

1 Cinn. etc. R. Co. *v.* Marcus, 38 Ill. 220; Mich. etc. R. Co. *v.* Oehm, 56 Ill. 293; Hamburg Am. Packet Co. *v.* Gattman, *supra;* Heelman *v.* Holiday, *supra.*

2 It is said in a good many reported cases that it is a difficult matter to define what baggage is. Rorer on Railroads, gives no definition (ch. XLIX, p. 988); nor does Wheeler on Carriers, nor Redfield on Carriers (ch. VII), nor Browne on Carriers (§ 59). Other definitions to be found in the text books are as follows: "All articles which it is usual for persons traveling to carry with them, whether from necessity, or for convenience or amusement." Angell on Carriers, § 115. "Only such articles as a traveler usually carries with him for his comfort or convenience, both during the journey and during his stay at the place of his destination." Wood on Railway Law, § 401. "Such articles of personal convenience and necessity as are usually carried by passengers for their personal use and not as merchandise." Hutch. on Carr., § 679. "Baggage" and "luggage" are synonymous. The former term is generally used in the United States, and the latter in England. The California Code, however, adopts the English expression. Cal. Civ. Code, § 2180.

3 Brooke *v.* Pickwick, 4 Bing. 218; McGill *v.* Rowand, 3 Pa. St. 451, 45 Am. Dec. 65; Railroad Co. *v.* Fraloff, 100 U. S. 24; Doyle *v.* Kiser, 6 Ind. 242; Fairfax *v.* R. Co., 73 N. Y. 176; Glovinsky *v.* Cunard Co. 24 N. Y. (Supp.) 136.

4 Van Horn *v.* Kermit, 4 E. D. Smith, 453; Duffy *v.* Thompson, 4 E. D. Smith, 178.

5 Cadwallader *v.* R. Co., 9 Lower Can. Rep. 269.

6 Merrill *v.* Grinnell, 30 N. Y. 620, Mullen, J.; Jones *v.* Voorhees, 10 Ohio, 415; Am. Contract Co. *v.* Cross, 8 Bush. 472; 8 Am. Rep. 471; McCormick *v.* R. Co., 4 E. D. Smith, 181; Coward *v.* R. Co., 16 Lea, 225, 57 Am. Rep. 226; Walsh *v.* The Wright, 1 Newb. Adm. 494.

an opera glass,[1] or a telescope of a traveler by sea,[2] or gold spectacles.[3]

(*b*) Jewelry naturally falls in this division,[4] as do other articles of ornament, such as the swords worn by a military officer when in full dress.[5]

(*c*) As recreation is a common and proper object of travel, things carried for that purpose are clearly baggage,[6] as for example, books for reading during the journey,[7] or the guns or fishing tackle of a sportsman, or the easel of an artist on a sketching trip.[8]

(*d*) Articles for the protection of the traveler would naturally include firearms, such as pistols and revolvers.[9] Protection from disease and accident, as well as from personal injury must be included. Hence, money, which might be required in case of sickness or accident on the way,[10] and medicines which he may need on his journey, and which he carries in his trunk are also clearly baggage.[11]

(*e*) A, for example, goes to New York from his home in C for a trip. He takes no baggage with him. While in New York, he purchases a trunk and a quantity of new clothes for himself. On his return to C with this trunk and clothes they are lost. They are bag-

1 Toledo R. Co. *v.* Hammond, 33 Ind. 379; 5 Am. Rep. 221.

2 Cadwallader *v.* R. Co. 9 Lower Can. Rep. 166.

3 Walsh *v.* The Wright, 1 Newb. Adm. 494.

4 Brooke *v.* Pickwick, 4 Bing. 218; McGill *v.* Rowand, 3 Pa. St. 451; 45 Am. Dec. 654; Coward *v.* R. Co., 16 Lea, 225; 57 Am. Rep. 226; McDougal *v.* Allen, 12 Low. Can. Rep. 321; Torpery *v.* Williams, 3 Daly 112; McCormack *v.* R. Co., 4 E. D. Smith, 181; Bruty *v.* R. Co., 32 U. C. Q. B. 66. *Contra*, Cadwallader *v.* R. Co., 9 Low. Can. Rep. 169. See Nevins *v.* Steamboat Co., 4 Bosw. 225.

5 Merrill *v.* Grinnell, 30 N. Y. 577.

6 Wilkins *v.* Earle, 19 Abb. 196; Hutchings *v.* R. Co., 25 Pa. 64; Macklin *v.* N. J. Steam Co., 7 Abb. Pr. 238.

7 Doyle *v.* Kiser, 6 Ind. 242.

8 See post (*h*).

9 Woods *v.* Devin, 13 Ill. 786; 57 Am. Dec. 483; Davis *v.* R. Co., 22 Ill. 278; 74 Am. Dec. 151; Parmelee *v.* Fischer, 22 Ill. 212; 74 Am. Dec. 138; Van Horn *v.* Kermit, 4 E. D. Smith, 454. But only in reasonable quantities — one revolver would ordinarily be enough. Chicago etc. R. Co. *v.* Collins, 56 Ill. 212.

10 Merrill *v.* Grinnell, 30 N. Y. 594.

11 In Bomar *v.* Maxwell, 9 Humph. 620, 51 Am. Dec. 682, there is a clearly erroneous intimation to the contrary.

gage.[1] The rule does not say that the particular passenger shall have any necessity for the articles but simply passengers of his habits and wants. The articles in this case would be necessary for the comfort of men in his walk of life; the clothes purchased did not go beyond this. Therefore, they are baggage. For a like reason, a pocket flask of whisky or a pair of gold spectacles the property of the passenger would be none the less baggage because he did not drink spirits or did not need glasses. But where, in another case, among a passenger's baggage was a spring horse weighing seventy-eight pounds and forty-four inches high standing on a flat surface—a child's toy; this was held not baggage.[2] Things that only an eccentric person or a crank would carry with him are not baggage. As said in the last case, "a person might travel often and never see an article such as this carried as part of the personal baggage of a traveler; it is clearly exceptional." In the leading American case on the subject of baggage,[3] the Supreme Court affirmed an instruction given below, that baggage could not include "such unusual articles as the exceptional fancies, habits or extravagancies of some particular individual prompts him to carry." Under this head will fall those cases where such things as a pair of handcuffs,[4] silver napkin rings,[5] silverware,[6] a concertina,[7] have been held not to be "baggage."

(*f*) As the things carried by him must be for his personal use, it is clear that such articles as a lady's sack and muff,[8] or a woman's jewelry,[9] when carried in

1 Dexter *v.* R. Co., 42 N. Y. 326, 1 Am. Rep. 530.

2 Hudston *v.* R. Co., 36 L. T. Rep. 213.

3 Railroad Co. *v.* Fraloff, 100 U. S. 24.

4 Bomar *v.* Maxwell, 9 Humph. 620; 51 Am. Dec. 682.

5 Chicago etc. R. Co. *v.* Boyce, 73 Ill. 510; 24 Am. Rep. 268.

6 Bell *v.* Drew, 4 E. D. Smith, 59.

7 Brutey *v.* R. Co., 32 U. C. Q. B. 66.

8 Chicago etc. R. Co. *v.* Boyce, 73 Ill. 510; 24 Am. Rep. 261.

9 Metz *v.* R. Co., 85 Cal. 329; 24 Pac. Rep. 610.

the trunk of a male passenger, could not be deemed his "baggage." Nor could presents for friends,[1] nor baggage of another person not a passenger.[2] So, where a passenger from Liverpool to London, took with him in a trunk, six pair of sheets, six pair of blankets, and six quilts, having given up his residence in Canada, these articles being intended for the use of his household when he should have provided himself with a home in London, the things were held not baggage.[3] Therefore, merchandise or articles carried for business or trade are not baggage,[4] nor samples of goods which he is engaged in selling carried in the trunk of a commercial traveler,[5] nor masquerade costumes taken by the passenger, a costumer, to be let for hire,[6] nor stage properties, costumes, paraphernalia and advertising matter of a theatrical company packed in trunks,[7] nor

1 Dexter *v.* R. Co., 42 N. Y. 326; 1 Am. Rep. 527; The Ionic, 5 Blatch. 532; Nevins *v.* R. Co., 4 Bosw. 325. In Dexter *v.* R. Co., 42 N. Y. 326., the court held that it was proper to include within the term "baggage," suits of clothing and other articles which the passenger might have purchased while on his journey for the use of members of his family at home. This ruling has been criticised, and is clearly wrong. See Rorer Railroads, 990.

2 Andrews *v.* R. Co.. 25 S. W. Rep. 1040 (Tex.).

3 Macrow *v.* R. Co., L. R. 6 Q. B. 612.

4 Weed *v.* R. Co., 19 Wend. 537; Smith *v.* R. Co., 44 N. H. 325; Pardee *v.* Drew, 25 Wend. 460; Hawkins *v.* Hoffman, 6 Hill, 589; Davis *v.* R. Co., 10 How. Pr. 332; Warner *v.* West. Trans. Co., 5 Robt. 495; Richards *v.* Westcott, 2 Bosw. 604; Blanchard *v.* Jones, 3 Barb. 389; Chamberlain *v.* West. Trans. Co., 45 Barb. 223; Hutchings *v.* R. Co., 25 Ga. 61; 71 Am. Dec. 156; Weeks *v.* R. Co., 7 Hun. 609; Davis *v.* R. Co. 22 Ill. 278; 74 Am. Dec. 151; Dunlap *v.* Int. Co., 98 Mass. 371; Spooner *v.* R. Co., 23 Mo. (App.) 403; Collins *v.* R. Co., 10 Cush. 506; Cahill *v.* R. Co., 13 Q. B. (N. S.) 818; Great North. R. Co. *v.* Shepherd, 8 Ex. 30; Belfast R. Co. *v.* Keys, 9 H. L. Cas. 556; Mich. Cent. R. Co. *v.* Carrow, 73 Ill. 348; 24 Am. Rep. 248; Haines *v.* R. Co., 29 Minn. 160; 43 Am. Rep. 199; Blumantle *v.* R. Co., 127 Mass. 332; 34 Am. Rep. 376; Grant *v.* Newton, 1 E. D. Smith, 95; Blumenthal *v.* R. Co., 11 Atl. Rep. 605; Collins *v.* R. Co., 10 Cush. 506; Dibble *v.* Brown, 12 Ga. 217; Stimson *v.* R. Co., 98 Mass. 83; Smith *v.* R. Co. 44 N. H. 325; Bell *v.* Drew, 4 E. D. Smith, 59; The Ionic, 5 Blatch. 538; Fairfax *v.* R. Co., 73 N. Y. 167.

5 Hawkins *v.* Hoffman, 6 Hill, 686; 41 Am. Dec. 767; Pinkerton *v.* Woodward, 33 Cal. 603; Wilkins *v.* Earle, 3 Robt. 369; Sloman *v.* R. Co., 13 Hun. 547; Davis *v.* R. Co., 10 How. 332; Stimson *v.* R. Co., 98 Mass. 84; 93 H. D. 140; Chamberlain *v.* Trans. Co., 45 Barb. 227; Richards *v.* Westcott, 2 Bosw. 604; Grant *v.* Newton, 1 E. D. Smith, 99; Jordan *v.* R. Co., 5 Cush. 72; Blumantle *v.* R. Co., 127 Mass. 324; Alling *v.* R. Co., 126 Mass. 121; 40 Am. Rep. 667; Penn. Co. *v.* Miller, 35 Ohio St. 541; 35 Am. Rep. 620; Texas etc. R. Co. *v.* Capps, 18 Cent. L. J. 211; 2 Tex. Civ. Cas. 34; Gurney *v.* R. Co., 14 N. Y. (Supp.) 321; 59 Hun. 625.

6 Michigan etc. R. Co. *v.* Oehm, 56 Ill. 293.

7 Oakes *v.* North Pac. R. Co., 26 Pac. Rep. 230.

money, except what is required for the expenses of the journey, according to (*g*) *post*.[1] Therefore, while a reasonable quantity of money for the purpose of the expense of the journey may be carried by the passenger in his trunk as well as on his person,[2] yet more than this, as for example, $11,250, in bills, in a traveler's trunk is not baggage,[3] nor is money in a trunk to pay

1 Orange County Bk. *v.* Brown, 9 Wend. 88; 24 Am. Dec. 129; Johnson *v.* Stone, 11 Humph. 420; Hicox *v.* R. Co., 31 Conn. 281; 83 Am. Dec. 143; Torpey *v.* Williams, 3 Daly, 162; Doyle *v.* Keyser, 6 Ind. 242; Whitmore *v.* Conline, 20 Mo. 13; Pfister *v.* R. Co., 70 Cal. 169; 59 Am. Rep. 404; Johnson *v.* Stone, 11 Humph. 409; Mad River R. Co. *v.* Fuller, 20 Ohio, 318; Woods *v.* Devin, 13 Ill. 747; 36 Am. Dec. 403; Walsh *v.* The Wight, 1 Newb. Adm. 494; Jordan *v.* R. Co., 5 Cush. 69; 51 Am. Dec. 44; Davis *v.* R. Co., 22 Ill. 278; Doyle *v.* Keyser, 6 Ind. 242; Weed *v.* R. Co., 19 Wend. 537; Merrill *v.* Grinnell, 30 N. Y. 611, overruling contrary opinions in Hawkins *v.* Hoffmann, 6 Hill, 586, and other New York cases; Duffy *v.* Thompson, 4 E. D. Smith, 178; Grant *v.* Newton, 1 E. D. Smith, 95; Bomar *v.* Maxwell, 9 Humph. 624; 51 Am. Dec. 682; Weekes *v.* R. Co., 9 Hun. 669; Hutchings *v.* R. Co., 25 Ga. 61. *Discordant Cases.*—Grant *v.* Newton, 1 E. D. Smith, 95; Hickox *v.* R. Co., 31 Conn. 281; 83 Am. Dec. 281. In the latter case it was held that a passenger cannot recover for money carried in his trunk for the purpose of purchasing clothing at the place to which he is going. It would surely be baggage if the money was taken to purchase clothing necessary for his journey, for whether the passenger took the clothing itself or money to buy it with, as he needed it, the result would be the same. And the report does not show that this was not the case.

2 It is safer there, and a prudent man may well place it in his trunk rather than increase the danger of violence to his person by pickpockets and robbers on the cars. Merrill *v.* Grinnell, 30 N. Y. 620; Jordan *v.* R. Co., 5 Cush. 69; 51 Am. Dec. 44; Ill. Cent. R. Co. *v.* Copeland, 24 Ill. 332; Davis *v.* R. Co., 22 Ill. 278; 74 Am. Dec. 151, is a discordant case. Here the passenger claimed to recover for $439 contained in his trunk on his trip by rail from New York to Chicago. The court said: "Unless it was in gold or silver, a trunk is no place to carry it in railroad traveling, even if wanted for traveling expenses, for it cannot readily be got for use." But the court was of the opinion both that the sum was unreasonable, and that the plaintiff's story was a false one, he having at first made no claim that there was money in his trunk. The case must be considered as having been decided on the latter ground rather than on the other. For having regard to the ultimate purpose of a journey from New York to Chicago, it could hardly be said that the sum was unreasonable. And the case is overruled in Ill. Cent. R. Co. *v.* Copeland, 24 Ill. 332; 76 Am. Dec. 749. The same is true of a watch. In one case it is said that the traveler is guilty of no negligence in placing a valuable watch in a trunk for use at the end of his journey. Jones *v.* Voorhees, 10 Ohio, 145. In another that a watch may well be regarded as safer in the trunk than on the person, when the traveler on his journey is compelled to mingle with and pass through large crowds of persons generally assembled about railroad depots. Am. Cont. Co. *v.* Cross, 8 Bush, 572; 8 Am. Rep. 47; and see Coward *v.* R. Co., 16 Lea, 225; 57 Am. Rep. 226; Merrill *v.* Grinnell, 30 N. Y. 520. Mullen J.; Jones *v.* Voorhees, 10 Ohio, 145; McCormack *v.* R. Co., 4 E. D. Smith, 181; Walsh *v.* The Wright, 1 Newb. Adm. 424; *Discordant Cases.*— Bomar *v.* Maxwell, 9 Humph. 620; 51 Am. Dec. 682, no reason given. See Miss. etc. R. Co. *v.* Kennedy, 41 Miss. 671.

3 Orange County Bk. *v.* Brown, 9 Wend. 85; 24 Am. Dec. 129.

a creditor at the place of destination or to invest there.[1]

(g) In the leading case in the Supreme Court of the United States, a Russian woman of wealth traveling for pleasure on this continent, carried with her six trunks which contained, among other articles of clothing, rare laces, which she was accustomed to wear when attending dinners, balls and receptions. These laces were found by the jury to be worth $10,000. It was held that they were baggage.[2] A German gentleman, traveling from Germany to California, has in his trunk six dozen shirts, it being shown that in Germany it is the custom, on account of the washing of clothes being done less frequently than in America, for persons like the passenger to keep on hand large quantities of linen; the shirts are "baggage."[3] A poor man traveling with his wife and family, has in his trunks, a bed, pillows, bolsters and bed quilts. These are baggage.[4]

Story's definition of baggage as "such articles of ne-

1 Merrill *v.* Grinnell, 30 N. Y. 610, Denio, C. J.; Jordan *v.* R. Co., 5 Cush. 69, Fletcher, J.

2 Railroad Co. *v.* Fraloff, 10 Blatchf. 16; 100 U. S. 24.

3 Merrill *v.* Grinnell, 30 N. Y. 613. In this case it is said: "It would be equally severe to limit the quantity of clothing a young lady going to a watering place may carry as baggage to that necessary to enable her to wear to and at her place of destination. She requires according to the views of necessity and in conformity to the habits and tastes of the society in which she moves, as much as would be required by another and less fashionable person in a year." See Coward *v.* R. Co., 16 Lea, 228; 58 Am. Rep. 226.

4 Ommit *v.* Henshaw, 35 Vt. 605; 84 Am. Dec. 646. The court said that poor persons commonly take such articles with them as baggage—their poverty makes it necessary; such things are frequently about all they have that would make baggage. They obtain cheap lodging, it might be added, at their destination, and cheaper rates of fare when traveling at night by their supplying themselves with their bedding, etc. Such is the custom on the second class sleeping cars in the United States. And see Hirschson *v.* Packet Co., 2 Jones & S. 521. There is a discordant case in Massachusetts, where it was held that proprietors of an ocean steamship are not liable, under their ordinary contract as common carriers to transport a passenger and her baggage, for the loss of a feather bed, carried by the passenger, but not intended for use on the voyage. Connolly *v.* Warren, 106 Mass. 146. The court went astray on the idea that articles to be baggage must be required for personal use on the voyage. A steerage passenger on a vessel is bound to provide her bedding for the voyage, that bedding constitutes a part of her baggage. Hirschson *v.* Hamburg Packet Co., *supra;* Glovinsky *v.* Cunard Co., 24 N. Y. (Supp.) 636.

cessity or convenience as are usually carried by passengers for their personal use," will clearly not do.[1] The character and quantity of articles taken by passengers for their personal use, are almost as varied as their countenances. There is no settled usage in this country or perhaps in any other as to what travelers shall carry for their personal use. One man gets along with very little; the hotels at which he intends to stop on his way, he looks to to supply him with all he wants; another man must carry with him his own brush and comb, razors and toilet conveniences; one man prefers to finish his journey in the suit he starts in; another requires frequent changes of clothing. Hence, the test must be not whether or not the articles claimed to be baggage are usually carried by passengers, but whether, according to the habits and wants of persons of like condition to him, the particular things would be fit and proper for their personal use.

(h) Articles for use at the end of a journey, or during a temporary stay at a particular place, are as properly baggage as those actually used, or intended to be used in transit.[2] Thus, the gun and case of a sportsman on a shooting tour,[3] or the fishing apparatus of one on a fishing trip,[4] or the easel of an artist on a sketching trip,[5] are certainly baggage. A leaves his home in the town of C to take up his residence in New York. He takes with him his ordinary wearing apparel, none of which he intends to use on his journey. This is baggage.[6] So, A, traveling by rail at night has

1 See Dibble *v.* Brown, 12 Ga. 217; 56 Am. Dec. 460.

2 Toledo R. Co. *v.* Hammond, 33 Ind. 379.

3 Macrow *v.* R. Co., 6 Q. B. 612, Cockburn, J.; Merrill *v.* Grinnell, 30 N. Y. 619; Van Horn *v.* Kermit, 4 E. D. Smith, 457.

4 *Id.*

5 *Id.*

6 Dexter *v.* R. Co., 42 N. Y. 326; 1 Am Rep. 527.

an opera glass in his trunk. This is baggage.[1] A student on the way to college, carries in his trunk, manuscript books which it is necessary for him to study there. These are baggage.[2] A commercial traveler has in his valise a "price book" of the articles he sells, which he is called upon to use from time to time in the business for which he is journeying. This is baggage.[3] In this case, the "price book" was a thing of personal use and convenience, according to the wants of the particular class of travelers to which the passenger belonged, and was taken with him as well with reference to the immediate necessities of his journey, as to the ultimate purpose of it. The passenger is a traveling dentist; in his trunk are his dental instruments. These are baggage.[4] The passenger is a working watchmaker and jeweler. In his trunk are the tools of his trade; the object of his journey, is to work at his trade at his destination. The tools are baggage;[5] and the same would be true of any journeyman mechanic, carrying his tools in his trunk.[6] A is a surgeon in the army, traveling with his troop; his surgical instruments are baggage.[7] A lady, traveling for pleasure, has in her trunks valuable laces which she wears at dinners, balls and receptions, at the different places she visits. These are baggage.[8]

[1] Toledo etc. R. Co. *v.* Hammond, 33 Ind. 379; 5 Am. Rep. 221 "Articles," said the court, "for use as baggage at the end of the journey or during a temporary stay at a particular place are as properly baggage as those actually used in the transit."

[2] Hopkins *v.* Westcott, 6 Blatchf. 64. In this case it was said: "With a lawyer, going to a distant place to attend court; with the author, proceeding to his publishers; with the lecturer, traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small yet an indispensable part of his baggage. * * * They are indispensable to the object of his journey." *Contra*, Phelps *v.* R. Co., 19 J. Scott, N S. 115, 19 C. B. N. S. 321.

[3] Gleason *v.* Trans. Co., 32 Wis. 85; 14 Am. Rep. 716.

[4] Brock *v.* Gale, 14 Fla. 523; 14 Am. Rep. 358.

[5] Kansas City etc. R. Co. *v.* Morrison, 34 Kan. 502; 55 Am. Rep. 254; 9 Pac. Rep. 225.

[6] Porter *v.* Hildebrand, 14 Pa. St. 112; Davis *v.* R. Co., 10 How. Pr. 330.

[7] Hannibal etc. R. Co. *v.* Swift, 12 Wall. 252.

[8] Railroad Co. *v.* Fraloff, 10 Blatchf. 16; 100 U. S. 24.

It is not limited to what the passenger may require during a particular part of his journey, to which the line of one class of carriers extends, but embraces the whole of his journey.[1] A, for an illustration, intending to go from Germany to California, buys a ticket from Liverpool to New York, on the defendant's line. His baggage includes such things as are necessary, not alone between Liverpool and New York, but during the whole of his contemplated journey, including stoppages which he may make *en route*.[2]

§ 273. **Rule in Last Section Modified by Usage.**— The usages and customs of carriers and travelers must be considered in ascertaining what is baggage, and it is clear that the legal meaning of the word "baggage" may be enlarged or restricted by such usages or customs. The free carriage of baggage, as we have seen, arose from the custom of the carrier, and not from any law or rule of public policy requiring baggage to be carried free. It has been often held that in determining what kind of goods a carrier is obliged to carry and is responsible for as a common carrier and an insurer, the custom of the carrier is looked to, and it being proved that it was his custom to receive and carry certain property for hire, his calling as a common carrier of such property becomes established, and his extraordinary liability as such attaches.[3] Therefore, if it should appear that things not heretofore considered by the courts as "baggage," have, by the usage of the time, of the carrier and of his patrons, come to be considered as baggage, they will be so treated.[4]

1 Merrill *v.* Grinnell, 30 N. Y 574.

2 Merrill *v.* Grinnell, 30 N. Y. 574.

3 Lawson Usages & Customs, 78.

4 Dibble *v.* Brown, 12 Ga. 217; 56 Am. Dec. 460. In Switzerland Marine Ins. Co. *v.* Louisville etc. R. Co., 13 Int. Rev. Rec. 342; 131 U. S. 440, the circuit court charged the jury that "baggage" does not include articles of merchandise for sale or for use as samples, and not designed for the use of the passenger, and that if the passenger has such articles checked and re-

§ 274. **Carrier May Refuse to Carry, When.**—A carrier may refuse to receive for transportation with the passenger what is not "baggage"; a railroad, for example, may refuse to receive on its passenger train property other than baggage, for the contract to carry the passenger implies an undertaking to carry as well only what is "baggage" within the rules heretofore given.[1] But if a railroad receives for transportation in the cars of its passenger trains, property of the passenger not baggage, it assumes the liability of a common carrier of merchandise. If the property which the passenger offers is not represented by him to be baggage and not so packed as to assume that appearance, and it is received for transportation on the passenger train, the carrier is justly held to the same responsibility as if the goods had been shipped by his freight train, for he has the same right to charge for their carriage.[2]

§ 275. **Effect of Failure to State Kind.**—On the other hand, a carrier is under no obligation to inquire of the passenger whether or not a trunk or valise presented by the passenger to be carried as baggage, contains only articles of the kind falling under the denomination of "baggage." He has a right to assume

ceived by the carrier as baggage, the carrier will not be liable for them if lost or injured, unless it was informed or was presumed to have known that the articles were merchandise, or unless it was the established custom or usage of the defendant to receive and transfer them as baggage, or unless they were lost by the gross negligence of the defendant. After a verdict and judgment for the plaintiff the case was affirmed by the Supreme Court of the United States. In Massachusetts, (Stimson *v.* R. Co., 98 Mass. 83; Alling *v.* R. Co. 126 Mass. 121,) in actions to recover for travelers' samples the court has rejected evidence of a general custom among merchants to sell goods by sample carried by their agents with their baggage and checked as such and a "general custom of railroads in general and the defendant railroad in particular to receive and check for the same in the same manner as ordinary baggage." These decisions, ignoring as they do the effect of usage and custom upon the liability of carriers, are clearly wrong.

[1] Norfolk R. Co. *v.* Irvine, 5 S. E. Rep. 532. 7 Id. 233; Pfister *v.* R. Co., 70 Cal. 169; 59 Am. Rep. 404; 11 Pac. Rep. 686.

[2] Hannibal etc. R. Co. *v.* Swift, 12 Wall. 262.

that it contains nothing but "baggage," and the passenger, by presenting the trunk or valise and saying nothing, impliedly represents that it contains only baggage.[1] By his silence he practices a fraud upon the carrier.[2]

§ 276. **Effect of Failure to State Value.**—Where the carrier has notified the passenger that he will not be liable for baggage beyond a certain sum unless the true value is stated, the carrier will be discharged from his extraordinary liability if the passenger either refuses to disclose the value or fails to do so, or by any artifice evades inquiry as to its true value.[3] But where the carrier makes no such inquiry, and the passenger does not, by any act or artifice of his, mislead the carrier as to the true value of the baggage,[4] his mere failure to disclose it is not such a fraud on the carrier as will release him from liability.[5]

§ 277. **May Enquire as to Contents of Trunk.**—A carrier may, as a condition precedent to his contract for the transportation of a passenger's baggage, require information from him as to its value, or kind, and demand extra compensation for any excess beyond that which he may reasonably demand to be trans-

1 Haines *v.* R. Co., 29 Minn. 160; 43 Am. Rep. 199; Humphreys *v.* Perry, 13 S. C. Rep. 711 (U. S.); Railroad Co. *v.* Keys, 9 H. L. Cas. 556; Mich. Cent. R. Co. *v.* Carrow, 73 Ill. 348; 24 Am. Rep. 248; Cahill *v.* R. Co., 10 C. B. (N. S.) 154, Byles, J.; Dunlap *v.* Steam Co., 98 Mass. 376; *contra*, Kuter *v.* R. Co., 1 Biss. 35, which must be considered as overruled by Humphreys *v.* Perry, *supra*.

2 Mich Cent. R. Co., *v.* Carrow, *ante*; Chicago etc. R. Co. *v.* Marcus, 38 Ill. 219; Blumenthal *v.* R. Co., 11 Atl. Rep. 605 (Me.); Hellman *v.* Holliday, 1 Woolw. 365. In the Carrow case it was said: "Whether any fraud, in fact, was intended, it is not necessary to inquire. The transaction was fraudulent in law and this is sufficient, by all the authorities, to avoid any contract whether express or implied. The fact that appellee offered as common baggage merchandise of extraordinary value is a legal fraud such as will excuse the performance of a contract."

3 Railroad Co. *v.* Fraloff, 100 U. S. 24.

4 For examples of this see the cases of carriage of goods so packed as to mislead the carrier as to their true value.

5 Railroad Co. *v.* Fraloff, 100 U. S. 24; Brown *v.* R. Co., 83 Pa. St. 316.

ported as baggage under the contract to carry the person.[1]

§ 278. **Knowledge of Carrier that Articles are Not Baggage.**—The carrier's knowledge that the articles presented to him are not baggage, may be *actual* or *constructive*. Where the carrier's agent is expressly notified of, or actually knows, the real nature of the property, there can be no question that the carrier will be liable for the articles just as though they were "baggage," if after such knowledge he chooses to accept them as baggage.[2] Thus, where the plaintiff gave his trunk and a package of carpeting to a baggage master, and received a check for the trunk, but was told that no check was necessary for the carpeting, and that it would go safely without it, and the carpeting was afterwards lost in the transit, it was held that the carrier was responsible for the loss.[3] Where a railroad receives the trunk of a passenger, after being advised that it contains articles of merchandise in addition to ordinary baggage, and receives for its transportation, because of extra weight, a sum in addition to the ordinary fare, in case of failure to deliver, it is liable for the contents as baggage.[4]

Constructive knowledge will arise where the articles

1 Railroad Co. *v.* Fraloff, 100 U. S. 24; Norfolk etc. R. Co. *v.* Irvine, 5 S. E. Rep. 532; 7 Id. 233 (Va.)

2 Mich. Cent. R. Co. *v.* Carrow, 73 Ill. 348; 24 Am. Rep. 248; Collins *v.* R. Co., 10 Cush. 506; Sloman *v.* R. Co., 67 N. Y. 208; Millard *v.* R. Co., 86 N. Y. 441; Tex. etc. R. Co. *v.* Capps, 2 Tex. Civ. Cas. 34; Jacobs *v.* Tutt, 33 Fed. Rep. 412; Hoeger *v.* R. Co., 63 Wis. 100; 53 Am. Rep. 271; Ross *v.* R. Co., 4 Mo. (App.) 582; Oakes *v.* R. Co., 29 Pac. Rep. 230; Fort Worth etc. R. Co. *v.* Rosenthal, 29 S. W. Rep. 199 (Tex.) "I think it safe to say that if the carrier knew or had notice of the character of the goods taken as baggage and still undertook to transport them, he is liable for their loss, although they are not travelers' baggage." Peckham, J., in Stoneman *v.* R. Co., 52 N. Y. 429; Jacobs *v.* Tutt, 33 Fed. Rep. 412; St. Louis etc. R. Co. *v.* Berry, 30 S. W. Rep. 464 (Ark.).

3 Minter *v.* R. Co. 41 Mo. 503.

4 Perley *v.* R. Co., 65 N. Y., 374; Strouss *v.* R. Co., 17 Fed. Rep. 209; Dibble *v.* Brown, 12 Ga. 217; 56 Am. Dec. 460; Camden etc. R. Co. *v.* Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481.

are so packed that their nature is discernable,[1] or the carrier has notice of facts which the jury believe was sufficient to inform him of the nature of the articles. In a New York case, the plaintiff's son, a lad eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks, containing the samples, different from ordinary traveling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggage master at a railroad depot, and when asked where he wanted them checked to, replied that he did not then know, as he had sent a dispatch to a customer at F, to know if he wanted any goods; if not, he wanted them to go to R, where he expected to meet some customers. Soon after, he had them checked to R, paying $2, and receiving a receipt ticket for them, headed "receipt ticket for extra baggage," etc. They were not weighed, and no evidence was given as to any regulation of the company in reference to charging extra compensation for passengers' baggage. It was held that the evidence justified the submission to the jury of the question of notice as to the contents of the trunks.[2]

The mere fact that the trunk presented is such a trunk as is usually carried by commercial travelers, is not such knowledge, for the baggageman has the

[1] Mich. Cent. R. Co. *v.* Carrow, 73 Ill. 348; 24 Am. Rep. 248; Chicago etc. R. Co. *v.* Conklin, 32 Kas. 55; Great North. R. Co. *v.* Shepherd, 8 W. H. & G. 30; Butler *v.* R. Co., 3 E. D. Smith, 571. In Dakota the plaintiff, having bought tickets of defendant railroad company for himself and family, pointed out to the baggage-master their baggage, consisting of three trunks and two boxes, and they were all checked except one box, a small, rough, pine box, such as is used for mercandise. This box was not checked for the sole reason that it had no handle or place to which a check could be fastened, but the agent received it, saying that he would place it in the baggage-car, and that it would go just as safe. Plaintiff made no misrepresentations, and was not asked as to contents or value. The court held that from the nature of the article the baggage-master should have inquired as to its contents, and having accepted it without doing so the carrier was liable for it as "baggage," though it did not contain baggage. Waldron *v.* R. Co., 1 Dak. 351; 46 N. W. Rep. 456.

[2] Sloman *v.* Great Western R'y Co., 67 N. Y., 208; reversing 6 Hun, 546.

right to rely on the implied representation that it contains only "baggage," and is not obliged to make inquiry as to its contents.[1] The fact that a box is presented and not a trunk, is not notice to the carrier that it contained merchandise, though as a matter of fact, baggage is oftener carried in trunks than in boxes, and merchandise more frequently in boxes than in trunks.[2] In an English case, the passenger carried with him a box covered with black leather; on the top his name was printed in white letters, and on the sides the word "glass." It was held that this was not notice to the carrier that the box contained merchandise.[3]

§ 279. **Owner of Baggage Must be Passenger.**—Because the carriage of baggage is incidental to the carriage of the passenger, the owner of the property must stand in the relation of passenger to the carrier in order to render the latter liable as such carrier of baggage.[4] If the carrier should be informed that the owner was not a passenger and did not intend to become one, he would be presumed to accept the property as freight and would be liable for it as a common carrier of goods.[5] But if the baggage was received in the expectation that the owner was to become a passenger and he did not do so, then the carrier would not be responsible for it as baggage, though he would, of course, as a bailee, be liable for a negligent loss of it.[6]

§ 280. **Need Not Accompany Baggage.**—But if the owner as a passenger, is unable, to the knowledge of the carrier, to accompany his baggage on the same conveyance, this fact will not prevent the liability of

[1] Mich. etc. R. Co. *v.* Carrow, 73 Ill. 348; 24 A. R. 248; Humphreys *v.* Perry, 13 S. C. Rep. 711.

[2] Belfast etc. R. Co. *v.* Keys, 9 H. L. Cas. 556.

[3] Cahill *v.* R. Co., 13 C. B. (N. S.) 818; 10 *Id.* 154.

[4] Hutch. Carr., § 701.

[5] *Id.* Wilson *v.* R. Co., *post.*

[6] Fairfax *v.* R. Co., 67 N. Y. 11; Collins *v.* R. Co., 10 Cush. 506.

the carrier for the baggage to attach. "The owner," as well said in an Iowa case, "if on the train, does not and is not required, and very often as is known, will not be allowed to exercise any control over his baggage after being placed in the appropriate car, and whether on the same, the preceding or the next train, if the baggage is sent pursuant to an agreement, and as part of the consideration moving from the company for the fare paid by the passenger, we cannot see why the same rules as to care and diligence do not apply."[1] If, however, the passenger has left his baggage behind, without any agreement with the carrier that it is to be forwarded to him as baggage, and the carrier, after he has transported its owner as a passenger, is entrusted with his baggage to be carried to him, he will not carry it in the character of baggage, but as freight, and he may charge for its carriage as such.[2] The carrier may claim compensation in advance, or he may postpone his claim until the delivery and rely on his lien or on the personal responsibility of the owner. Therefore, it makes no difference that nothing was said at the time it was delivered about compensation, the rule of responsibility is the same, the actual liability for the freight and the lien of the carrier for its payment constituting the consideration for the undertaking.[3]

§ 281. **When Liability as Carrier Begins.**—The liability of the carrier commences when the baggage is

1 Warner *v.* R. Co., 22 Ia. 166; 92 Am. Dec. 389; Logan *v.* R. Co., 11 Rob. La. 24; 43 Am. Dec. 199.

2 Wilson *v.* R. Co., 57 Me. 138; 2 Am. Rep. 26; Graffam *v.* R. Co., 67 Me. 234; Wilson *v.* R. Co., 56 Me. 60; 96 Am. Dec. 435.

3 The Elvira Hancock, 2 Blatchf. 339. "There is no evidence that the plaintiff claimed it should be carried without compensation as passenger baggage or that the defendant agreed so to transfer it. It mattered not whether it was a trunk or a barrel of flour. It was received to be safely carried. It was known to be the trunk of a passenger who had previously passed over the road." Wilson *v.* R. Co., 57 Me. 138; 2 Am. Rep. 26.

delivered to it for carriage.[1] This may be before the time when the train is scheduled to start. But the railroads of the country do not hold themselves out as store houses of baggage, and the public, it has been said, have no right to assume that they are such.[2] Travelers have no right to send their baggage to the baggage rooms or stations to be kept in store or for an unreasonable length of time awaiting a train. The liability of the railroad as a carrier commences a reasonable time prior to the starting of the train on which it is to go;[3] 9:30 at night for a 4:25 morning train has been held a reasonable time.[4] So is 11 a. m. for a train at 3 p. m.;[5] so is 12 o'clock noon for a train at 3:30 p. m.[6]

§ 282. **Before Purchase of Ticket.**—A railroad might adopt a regulation that a person intending to become a passenger shall purchase a ticket or pay his fare before the company will accept his baggage for transportation, and such a rule would be perfectly valid, and a passenger could not compel the railroad to accept his baggage until the ticket had been purchased, or the fare paid. But if the carrier has no such regulation, or if, notwithstanding such rule, he receives a person's baggage, relying upon his purchasing a ticket or taking passage on the train on which

[1] Hickox *v.* R. Co., 31 Conn. 281; 83 Am. Dec. 143; Jordan *v.* R. Co., 5 Cush, 69; 51 Am. Dec, 44; Logan *v.* Ponchartrain R. Co., 11 Rob. 24; 43 Am. Dec. 199; Dickenson *v.* Winchester, 4 Cush. 114; 50 Am. Dec, 760; Dibble *v.* Brown, 12 Ga. 217; 56 Am. Dec. 460.

[2] Lake Shore etc. R. Co. *v.* Foster, 104 Ind. 293; 54 Am. Rep. 330.

[3] *Id.* Hickox *v.* R. Co., *supra.*

[4] Lake Shore etc. R. Co. *v.* Foster, 104 Ind. 293; 54 Am. Rep. 330; 4 N. E. Rep. 20.

[5] Hickox *v.* R. Co., *supra.*

[6] Rogers *v.* R. Co., 56 N. Y. 620. "In order to render a carrier liable for the loss of baggage, it is sufficient to show a delivery of the baggage to him, and from the time of such delivery, although some time in advance of the time when it will start upon its transit, the carrier is liable for it as a common carrier and not as a warehouseman and if it is lost *before* the time for it to start upon its transit, the carrier is liable." Wood's Railway Law, § 404. The same language is used in Mr. Wood's notes to Browne on Carriers, p. 125.

the trunk is to go, he will be liable as an insurer for the loss of such property, whether the loss occurs before or after the departure of the train, or before or after the purchase of a ticket or the payment of fare.[1] The fact that the person after having his baggage checked may change his mind as to the journey and withdraw it, does not alter the case. If a man delivers his baggage to the carrier, and it is accepted by the carrier, but before he buys his ticket it is stolen, the carrier will be liable, even though the intending passenger, on account of the loss of his baggage, gives up the journey.[2] It is generally laid down that the carrier is liable as such for all baggage left with its agents by the passenger with the intention of proceeding with it by the next train or conveyance.[3]

§ 283. **Baggage Left Without Notice.—Custom.** —Though notice to the carrier that the baggage has been left on his platform would ordinarily be necessary, yet custom may do away with this requisite. Thus, in an Iowa case,[4] the plaintiff, intending to take an early morning train, sent her trunk the night before by a drayman to the depot who left it in the waiting room, and as there were no employes of the defendant about the premises, no notice thereof was given to anyone. That night the trunk was destroyed by fire. It was shown that it was customary for travelers to leave their baggage in this way for the morning train. A judgment having been obtained in favor of the railroad, the Supreme Court on appeal, said:

1 Lake Shore etc. R. Co. *v.* Foster, 104 Ind. 293; 54 Am. Rep. 319; 4 N. E. Rep. 20; Green *v.* R. Co., 38 Iowa, 100; 41 Iowa, 410; Woods *v.* Devin, 13 Ill. 747; 56 Am. Dec. 483.

2 Green *v.* R. Co., *supra*; Camden etc. R. Co. *v.* Belknap, 21 Wend. 354; Rogers *v.* R. Co., 1 Thomp. & C. 396; 56 N. Y. 620.

3 Camden etc. R. Co. *v.* Belknap, 21; Wend. 354; Hickox *v.* R. Co., *supra*; Green *v.* R.Co., 38 Iowa, 100; 41 Iowa, 410.

4 Green *v.* R. Co., 38 Iowa 100; 41 Iowa 410.

"Upon evidence of this character, it was proper that the facts should have been left to the determination of the jury, whether there had been a delivery of the property within the rules above announced,—whether a course of business, a custom, had been established, to the effect that a delivery of baggage at the station house, without notice, was regarded by defendant as a delivery to its servants, and whether plaintiff's trunk was received under this custom." After a second trial a judgment against the railroad was affirmed.

§ 284. **The Baggageman and His Powers.**—The convenience of travelers requires that they shall have an opportunity of delivering baggage at any reasonable time before the departure of the train, and it is therefore the carrier's duty to keep an agent at stations to receive and take care of such baggage.[1] Such agent may be one appointed by the carrier or the agent of another carrier, but who has been permitted by the former to receive baggage for it.[2] Though the carrier has a regulation that no baggage shall be checked until a ticket is purchased by the passenger, it will be liable if the baggageman receives it without. "The baggageman," it was said in one case, "is the agent of appellant, with general authority to receive the baggage of persons intending to go upon the company's trains. He was so held out to the public. That was the general scope of his business, authority and agency. Whatever he did within the general scope of his agency was binding upon the company, unless the owner of the baggage in some way had notice of limitations imposed upon his general authority."[3] The same conclusion was reached where a railroad had a rule

[1] Jordan *v.* R. Co., 5 Cush. 69; 51 Am. Dec. 44; Hickox *v.* R. Co., 31 Conn. 281; 81 Am. Dec. 143.

[2] Jordan *v.* R. Co., *supra.*

[3] Lake Shore etc. R. Co. *v.* Foster, 104 Ind. 293; 54 Am. Rep. 325; 4 N. E. Rep. 20.

against carrying live animals as baggage, but the baggageman received a dog of a passenger;[1] or where the baggageman allowed goods to be checked as baggage which he knew was not,[2] and where he received a trunk as baggage which he knew contained a large sum of money.[3]

§ 285. **The Baggage Check.**—The custom of checking does not affect the character of the delivery. The check is a receipt, and may be given at any time; it is not the contract, but simply is evidence of the ownership, delivery and identity of the baggage.[4] The contract to carry the passenger, as we have seen, includes a contract to carry his baggage, and the liability of the carrier being fixed at the time the passenger buys his ticket or pays his fare, cannot be altered by any conditions which may be printed upon the check.[5] The check is simply a token.

The production of a check is *prima facie* evidence that

1 Cantling *v.* R. Co., 54 Mo. 385; 14 Am. Rep. 476.

2 Sloman *v.* R. Co., 67 N. Y. 208; Tex. etc. R. Co. *v.* Capps, 2 Civ. Cas. Tex. 34; Minter *v.* R. Co., 41 Mo. 503. "The railroad having placed the baggage-master in its baggage-room holds out to the public that he has authority to make arrangements as to what sort of baggage shall be carried." Strouss *v.* R. Co., 17 Fed. Rep. 211. *Contra*, Blumantle *v.* R. Co., 127 Mass 322; 34 Am. Rep. 376.

3 St. Louis, etc. R. Co. *v.* Berry, 30 S. W. Rep. 704 (Ark.).

4 In a Connecticut case plaintiff took his trunk to a railroad station at 11 a. m. and requested that it might be checked for the next train to B at 3 p. m., but being informed by the agent that they did not check baggage until 15 minutes before the train left, he left the trunk with the agent, and at the proper time called for and obtained a check, and went himself by the same train. When he received the trunk again, some money and clothing had been taken from it, but it did not appear whether it was done while the trunk was lying at the station, or after it left. *Held*, that the railroad received the trunk when first delivered for transportation, and not for storage, and that its liability commenced as soon as it was delivered to their agent. Hickox *v.* R. Co., 31 Conn. 281; 83 Am. Dec. 143.

5 See as to limiting liability by notices on "baggage checks," §150. Dill *v.* R. Co., 7 Rich. (L.) 158; 62 Am. Dec. 407. In several States—Massachusetts, Vermont, New York, New Jersey, Illinois, Michigan, Missouri, North Carolina, Texas, California, Nevada, Idaho, South Carolina, Mississippi, New Mexico, Utah and Arizona—it is required by statute that every railroad, when requested to do so, shall give checks to passengers for their baggage, and redeliver the same to the passengers upon the surrender of such checks. Stimson Am. Stat. L. Vol. 2; see Najac *v.* R. Co., 7 Allen, 329; 83 Am. Dec. 686.

the owner was a passenger, and that the carrier received the plaintiff's baggage;[1] a trunk being the usual means of conveying baggage, it is evidence of the delivery of a trunk.[2]

§ 286. **When Liability of Carrier Ends.**—The liability of the carrier continues until the baggage has been delivered to the passenger or is ready for delivery to him at the end of the carrier's route.[3] It continues while it is in the carrier's depot awaiting a connecting carrier, on a through contract of carriage.[4] Upon the arrival of the vehicle at the passenger's destination, the carrier should have the baggage upon the platform at the usual place of delivery, so that the owner may receive it;[5] and when this is done, it is the duty of the passenger to call for it within a reasonable time.[6] What is a reasonable time will frequently depend on the facts of the case; but the facts being undisputed, it is a question of law for the court.[7] The "reasonable time" is generally at once, upon his leaving the train;[8] though of course it would not be required of him that he should expose his person to injury or endanger his safety in the crowd in the attempt to immediately designate and claim his baggage.[9]

1 Kas. City R. Co. *v.* Montelle, 10 Kas. 119; Davis *v.* R. Co., 22 Ill. 278; 74 Am. Dec. 151; Hickox *v.* R. Co., *supra*; Chicago etc. R. Co. *v.* Clayton, 78 Ill. 616; Davis *v.* R. Co., 10 How. Pr. 330; Ill. Cent. R. Co. *v.* Copeland, 24 Ill. 332; 76 Am. Dec. 749; Ill. Cent. R. Co. *v.* Clayton, 78 Ill. 618; Check *v.* R. Co., 10 How. Pr. 330; Atchison etc. R. Co. *v.* Brewer, 20 Kas. 669.

2 Dill *v.* R. Co., 7 Rich (L.) 158; 62 Am. Dec. 407.

3 Ouimit *v.* Henshaw, 35 Vt. 605; 84 Am. Dec. 647.

4 Ouimit *v.* Henshaw, *supra*.

5 Ouimit *v.* Henshaw, *supra*.

6 Ouimit *v.* Henshaw, 35 Vt. 605; Roth *v.* R. Co., 34 N. Y. 548; Warner *v.* R. Co., 22 Ia. 166; 92 Am. Dec. 389; Curtis *v.* R. Co., 74 N. Y. 116; 30 Am. Rep. 271; Nevins *v.* Bay State etc. Co., 4 Bosw. 225; Gilhooly *v.* New York etc. Steam Co., 1 Daly 197; Patscheider *v.* R. Co., L. R. 3 Ex. 153; Carey *v.* R. Co. 29 Barb. 635.

7 Chicago etc. R. Co. *v.* Boyce, 73 Ill. 510; 24 Am. Rep. 268; Roth *v.* R. Co., 34 N. Y. 548; 90 Am. Dec. 736; Gilhooly *v.* Steam Nav. Co., 1 Daly, 197; Curtis *v.* R. Co., 49 Barb. 148.

8 Ouimit *v.* Henshaw, 35 Vt. 605.

9 Angell Carr., § 114; Ouimit *v.* Henshaw, *supra*.

It has been held that the passenger had delayed an unreasonable time, where he, having arrived on Saturday afternoon, his baggage was destroyed by fire in the depot at 3 a. m. on Monday[1] where he arrived at 8:30 p. m., and allowed his baggage to remain at the station over night;[2] where a passenger by water, arriving on Monday did not demand it until Wednesday;[3] where he arrived at 3 p. m. and did not demand it until 8 p. m.,[4] where he left it for seventeen hours,[5] for two days,[6] and for one whole day.[7]

If the baggage is ready for delivery on arrival of the train, or other vehicle, the lateness of the hour of arrival will not excuse him from calling for it;[8] nor will the fact that he has been detained on his journey by illness;[9] nor

1 Hoeger *v.* R. Co., 63 Mo. 100; 53 Am. Rep. 271.

2 Louisville etc. R. Co. *v.* Mahan, 8 Bush, 184; Jacobs *v.* Tutt, 33 Fed. Rep. 412.

3 Van Horn *v.* Kermet, 4 E. D. Smith 483.

4 Penton *v.* R. Co., 28 U. C. Q. B. 367.

5 Jones *v.* Trans. Co., 50 Barb. 193.

6 Burnell *v.* R. Co., 45 N. Y. 184; 6 Am. Rep. 61.

7 Holdridge *v.* R. Co., 56 Barb. 191.

8 Ouimit *v.* Henshaw, 35 Vt. 605; Roth *v.* R. Co., 34 N. Y. 548.

9 Chicago etc. R. Co. *v.* Boyce, 73 Ill. 510. 24 Am. Rep. 269, the court saying: "The court at the instance of appellee, instructed the jury 'that a reasonable time allowed the plaintiff to claim his baggage means such time as is reasonable considering the state of his health, and his ability to proceed to his destination, or to make demand, and the other circumstances in the case proven.' This charge does not state the law correctly, as appliable to the facts of this case. Commonly the passenger and his luggage are carried on the same train, and it is delivered to him on the platform on his arrival. But if, for any reason, not the fault of the company, the passenger does not choose to claim it, the carrier may rightfully store it in a secure warehouse. This is not for the benefit of the carrier, but for the convenience of the traveler. It was never intended that passenger carriers should become warehousemen of the traveler's personal luggage. The common custom is to deliver it immediately upon its arrival at its destination, on the platform. It would be extending the liability of such carriers beyond anything required by public exigency, or the necessities of public interests, to hold them responsible as common carriers after the lapse of a reasonable time, or after the traveler has had a reasonable opportunity to claim and take away his personal baggage, and unless the carrier itself is at fault, it seems to us the passenger ought not to be permitted to extend the strict and rigid liability incident to common carriers, for any purposes of his own convenience, nor by reason of any inevitable accident to himself. The carrier never contracted to carry him as a passenger with a view to such extended liabitity for his baggage. It is sought to justify the giving of the instruction upon the facts testified to by the appellee, that his journey was delayed on account of sickness. The company, it is contended, consented to the delay by giving him a "lay-over ticket." It was under no legal liability to give him such a ticket, and it

that the day is Sunday.[1] In all these cases, however, it is assumed or proved that the baggage was ready for the passenger as he left the vehicle.[2] If the carrier, for his own convenience, does not permit baggage to be claimed and taken away from his platform, but carries it to his baggage room until it is convenient for him to deliver it there, the liability of the carrier will be extended until such time as the passenger may have had a reasonable opportunity to claim it at that place.[3]

§ 287. **Liability of Carrier as Warehouseman.**— Though his liability as a carrier has ceased, the baggage, not being called for within a reasonable time, the carrier cannot abandon it, but on the contrary, the law requires that he have a safe, secure and proper place in which to store it, until called for or otherwise disposed of according to law.[4] After the passenger has had an opportunity to remove his baggage, it remains in the custody of the carrier, not as a carrier, but as a warehouseman.[5] From thenceforward, he

was done for the humane purpose of accommodating the passenger. He was physically unable to prosecute his journey. This was certainly no fault of the company, and if the carrier was willing to oblige him in his exremity, its re sponsibility ought not, for that reason, to be enlarged. Had his sickness continued for any considerable period, it seems unreasonable that the company, during all the time it should be compelled, in consequence thereof, to keep his luggage in its warehouse, should be held to the strict and rigid liability of a common carrier. We think the objection to this evidence offered by appellee ought to have been sustained; its production could only mislead the jury; it did not tend to show it was through any neglect or default of the company that it was compelled to place appellee's luggage in its warehouse; and if it proves anything, it is that the company gave him the "lay-over ticket" on the implied condition the passenger would consent that the carrier might place his baggage on its arrival, in its warehouse, using ordinary care for its preservation."

1 Jones *v.* Trans. Co., 50 Barb. 193.

2 See Dittman etc. Co. *v.* R. Co., 59 N. W. Rep. 257 (Ia.).

3 Ouimit *v.* Henshaw, 35 Vt. 605; Jacobs *v.* Tutt, 33 Fed. Rep. 412.

4 Mote *v.* R. Co., 27 Ia. 22; 1 Am. Rep. 212; Bartholomew *v.* R. Co., 53 Ill. 227; 5 Am. Rep. 45; Chicago etc. R. Co. *v.* Fairclough, 52 Ill. 106; Mattison *v.* R. Co., 57 N. Y. 552.

5 Mote *v.* R. Co., 27 Ia. 22; 1 Am. Rep. 212; Roth *v.* R. Co., 34 N. Y. 548; Pike *v.* R. Co., 40 Wis. 583; Dininny *v.* R. Co., 49 N. Y. 546; Chicago etc. R. Co. *v.* Boyce, 73 Ill. 510; 24 Am. Rep. 268; Roth *v.* R. Co., 34 N. Y. 548; 90 Am. Dec. 736; Van

is not an insurer, but is bound to exercise the same care only that ordinary prudent men do in keeping their own goods of similar kind or value.[1]

§ 288. **As to Connecting Carriers.**—The rules hereafter stated in regard to connecting carriers of passengers,[2] apply likewise to the passenger's baggage, the carriage of which is regarded as only an incident to the carriage of the passenger.[3] A railroad, checking baggage over its own and other lines is liable for it until it reaches its destination.[4] And the fact that at some point on the passenger's journey his baggage is rechecked, will not operate as a new contract for its carriage from that point, as such act will be considered as merely carrying out the original contract.[5] If the action be brought against the connecting carrier, it will, of course, be necessary for the passenger to show that his baggage came into the possession of the defendant, and was injured or lost while in such possession;[6] but this may be shown by evidence from which such possession may be presumed, as well as by direct proof,[7] as by producing the carrier's check and showing that a part of the baggage was delivered

Horn *v.* Kermit, 4 E. D Smith, 454; Louisville etc. R. Co. *v.* Mahan, 8 Bush, 184; Holdridge *v.* R. Co., 56 Barb. 191; Bartholomew *v.* R. Co., 53 Ill. 227; 5 Am. Rep. 45; Burnell *v.* R. Co., 45 N. Y. 184; 6 Am. Rep. 61; Chicago etc. R. Co. *v.* Fairclough, 52 Ill. 106; Mattison *v.* R. Co., 57 N. Y 552; Ross *v.* R. Co., 4 Mo. App. 583; Penton *v.* R. Co., 28 U. C. Q. B. 367; Patscheider *v.* R. Co., L. R. 3 Ex. Div. 153; Chicago etc. R. Co. *v.* Addizoat, 17 Ill. App. 632; Ouimit *v.* Henshaw, 35 Vt. 605; 84 Am. Dec. 646; Warner *v.* R. Co. 22 Iowa, 166; 92 Am. Dec. 389.

1 Chicago etc. R. Co. *v.* Boyce, 73 Ill. 510; 24 Am. Rep. 268; Roth *v.* R. Co., 34 N. Y. 548.

2 *Post*, § 291.

3 Candee *v.* R. Co., *post*; Kessler *v.* R. Co., 61 N. Y. 538; *s. c.* 7 Lans. 62; McCormick *v.* R. Co., 4 E. D. Smith, 181; Chicago etc. R. Co. *v.* Fahey, 52 Ill. 81; 4 Am. Rep.; Fairfax *v.* R. Co., 5 J. & S. 516; Knight *v.* R. Co., 56 Me. 234; Hartan *v.* R. Co., 114 Mass. 44; Hood *v.* R. Co., 22 Conn., 1; Elmore *v.* R. Co., 23 Conn. 457; Isaacson *v.* R. Co., 94 N. Y. 278; 46 Am. Rep. 142.

4 Ill. Cent. R. Co. *v.* Copeland, 24 Ill. 332; 76 Am. Dec. 749.

5 Candee *v.* R. Co., 21 Wis. 582; 94 Am. Dec. 566.

6 Kessler *v.* R. Co., *ante;* McCormack *v.* R. Co., *ante*; Chicago etc. R. Co. *v.* Fahey, *ante*; Fairfax *v.* R. Co., 5 J. & S. 516; Baltimore etc. Steam Co. *v.* Smith, 23 Md. 462.

7 Kan. Pac. R. Co. *v.* Montello, 10 Kan. 111.

by him at the destination.[1] Where a railroad gives its check to a passenger for the check of another connecting road, this, though the baggage had not yet arrived, is *prima facie* evidence of the receipt of the baggage, especially where it had surrendered the passenger's check to the first road.[2] Efforts by the connecting road to find a passenger's lost baggage, or even an offer to compromise the plaintiff's claim, will not render it liable, if it appears that the baggage had never come into its possession.[3]

§ 289. **Where Baggage in Custody of Passenger.** —The liability of a common carrier of goods was founded, as we have seen, upon the fact that having the custody of the goods, he was in a position, by collusion with others, to make away with them, and when called upon to explain their loss, to set up an excuse which the customer would be unable to disprove. For the same reasons was the carrier of passengers held to be an insurer of the safety of the passenger's baggage. But where the carrier has not the custody of the baggage; where it has not been delivered into his hands, these reasons are absent, and the strict liability of the carrier could hardly in fairness be enforced.

Hence, where there has been no delivery of the property to the carrier—as in the case of articles carried upon or about the person—the clothing he is wearing, the watch or jewelry carried in his pocket, the money in his purse or the like—it seems to be generally settled that the carrier is not liable as an insurer, because

[1] McCormack *v.* R. Co., 4 E. D. Smith 181.

[2] Chicago etc. R. Co. *v.* Clayton, 78 Ill. 616. If, on a change of passage from one railroad to another, the agent of the latter road who has given the passenger a new check for his check does not find the baggage which is checked, he should give immediate notice to the owner, or the latter road will be liable. Davis *v.* R. Co., 22 Ill. 278.

[3] Mich. South. R. Co. *v.* Meyres, 21 Ill. 627.

there has been no delivery of it to him.[1] Thus, where a passenger went into a car with his overcoat on his arm, which he threw on his seat, and when he left the train at its destination, forgot to take it with him, the court said: "The overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers. * * * If they were under any obligation to take charge of the article in question after it was discovered to have been left in the car (and it is not necessary to deny that they were), ordinary care is all that can be exacted, and that was sufficiently established."[2]

But as to property not carried upon or about the person of the passenger, the mere fact that the carrier permits it to be taken by the passenger into the particular car in which he is riding, in order that he may have the use of it during the journey, instead of placing it in the baggage car, does not necessarily prove that the passenger has assumed custody of it or has taken it out of the legal custody of the carrier.[3]

In the leading English case on the subject,[4] Cockburn, C. J., said: "I am far from saying that no case can arise in which a passenger having luggage which, by the terms of the contract, the company is bound to convey to the place of destination, can release the company from the care and custody of an article, by taking it into his own immediate charge; but I think the circumstances should be very strong to show such an intention on the part of the passenger, and to relieve the company of their ordinary liability. And it is not because a part of the passenger's luggage, which is

1 Clark *v.* Burns, 118 Mass. 275; The Chrystal Palace, 16 B. Mon. 302; Weeks *v.* R. Co., 72 N.Y. 50; Tower *v.* R. Co., 7 Hill 47; 42 Am. Dec. 36.

2 Tower *v.* R. Co., *supra.*

3 Le Conteur *v.* R. Co., L. R. 1 Q. B. 54; 6 B. & S. 961; 13 L. T. (N. S.) 325.

4 Le Conteur *v.* R. Co., *ante*

to be conveyed with him, is, by the mutual consent of the company and himself, placed with him in the carriage in which he travels, that the company are to be considered as released from their ordinary obligations. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have about him in the carriage in which he travels, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safe carriage, it would follow that no one who has occasion to leave the carriage temporarily, could do so consistently with the safety of his property. I cannot think, therefore, we ought to come to any conclusion which would have the effect of relieving the company as carriers from the obligation to carry safely, which obligation, for general convenience of the public, ought to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances, such, in fact, as would lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company, before we say the company, as carriers, are relieved from their liability in case of loss. If, therefore, this case had depended on the question, whether or not the company were liable upon the general issue, I should be of opinion that the plaintiff was entitled to recover." All the judges agreed that the possession of his baggage, retained by the passenger, might be so complete and exclusive as to relieve the carrier from all responsibility in respect to it.

The question has presented itself both in actions against *(a)* carriers by land and *(b)* by water.

(a) Carriers by Land. — In the leading English case,[1] the passenger's valise had been placed by the railroad porter on the seat of the carriage in which he was riding, and the court said that it would require "such circumstances as would lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company before we say the company as carriers, are relieved from their liability in case of loss."[2] The point is not so clearly presented in the American cases,[3] but the principle is clearly right.[4]

(b) Carriers by Water. — In this case it seems, however, to be well settled that the baggage of passengers may be taken by them into the state-rooms which are assigned to them, without relieving the carrier from any of his responsibility for its safety, as a common carrier, unless it appear as a matter of fact that the passenger has taken it into his charge *animo custodiendi*, to the exclusion of the carrier, the assign-

1 Le Conteur *v.* R. Co., *supra.*

2 And see Richards *v.* R. Co., 7 M. G. & S. 50; 6 Eng. R. R. & C. Cas. 49; 62 Eng. Com. L. 837; Gamble *v.* R. Co., 24 U. C. Q. B. 407; Bergheim *v.* R. Co., L. R. 3 C. P. Div. 221; 6 Cent. L. J. 222.

3 See Kinsley *v.* R. Co., 125 Mass. 54.

4 In Hannibal etc. R. Co. *v.* Swift, 12 Wall. 262, the Supreme Court of the United States says: "The control and management of the car or of the train by the servants and employees of the company were not impeded or interferred with; and where no such interference is attempted, it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety." In an action against a sleeping car company, it was said: Blum *v.* South. Pull. Car Co., 3 Cent. L. J. 592; Pull. Pal. Car Co. *v.* Freudenstein, 34 Pac. Rep. 579 (Col.) "It is undoubtedly the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss, as, for instance, when a passenger's pocket is picked, or an overcoat or a satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it cannot be liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care, upon his own part is impossible. There is all the delivery which the circumstances of the case admit."

ment to the room being generally "a designation of the place in which the traveler may put his ordinary baggage," without excluding the custody of the carrier.[1] It has been even held that a regulation forbidding passengers from taking their baggage into their staterooms except at their own risk was unreasonable and void, so far as it would apply to light baggage or satchels containing articles for present use in travel.[2]

From the foregoing cases we conclude:

1. That as to articles carried upon or about the person of the passenger, and which, if they had been delivered to the carrier would have been "baggage," the carrier is liable only for a loss arising through his negligence or want of ordinary care.[3]

2. That as to articles which, though delivered[4] to the carrier are yet allowed for his convenience to accompany the passenger on the same vehicle, the carrier is an insurer.

3. But as to articles not "baggage," and of which the carrier has no notice, as, for example, large sums of money carried by the passenger on his person, the carrier is not liable at all.[5]

Thus, where plaintiff intrusted a package of money

1 Hutch. Carr., § 700. Gore *v.* Trans. Co., 2 Daly, 254; Mudgett *v.* Steamboat Co., 1 Daly, 151; Gleason *v.* Tran. Co., 32 Wis. 85; 14 Am. Rep. 716; Macklin *v.* N. J. Steamboat Co., 7 Abb. Pr. (N. S.) 24; Van Horn *v.* Kermit, 4 E. D. Smith, 453; American Steam. Co. *v.* Bryan, 83 Pa. St. 446; Walsh *v.* The Wright, 1 Newb. Adm. 494; Dunn *v.* New Haven Steam Co., 12 N. Y. Supp. 406; 58 Hun, 461; Williams *v.* Keokuk Co., 3 Cent. L. J. 400. See McKee *v.* Owen, 15 Mich. 115, where the question is discussed at length by an equally divided court.

2 Macklin *v.* N. J. Steam Co., 7 Abb. Pr. (N. S.) 241.

3 The sleeping car cases, *post*, also illustrate this principle.

4 The delivery to the carrier must always be proved. In a Canadian case where a passenger entered a car just before the train started, left his valise on a vacant seat and went out, and upon his return the valise was gone, it was held that there had been no sufficient delivery of the valise to the carrier, it not appearing that anyone was in charge of the train at the time. Kerr *v.* R. Co., 34 U. C. C. P. 209.

5 First Nat. Bank *v.* R. Co., 20 Ohio St. 259; 5 Am. Rep. 655; Wilcox *v.* The Philadelphia, 9 La. 80; 29 Am. Dec. 436; Hillis *v.* R. Co., 33 N. W. Rep. 643 (Ia.); Weeks *v.* R. Co., 72 N. Y. 50.

to his agent to carry, and the agent, while a passenger on the railroad, was killed, and the money which was carried on the agent's person, without notice to the railroad company, was destroyed by the company's negligence, it was held that the company was not liable for the loss of the money.[1] In an Iowa case, a passenger gave his overcoat, containing a pocket book in which was the sum of $500 which he was taking with him for the purpose of making an investment, to the porter of the sleeping car, who hung it up in his berth. He had money enough for traveling expenses elsewhere about his person. During the journey, the train was derailed, the car in which he was riding being thrown on its side and taking fire. The passenger got out safely, and after the fire was extinguished he told the porter in regard to the money, and the overcoat was returned to him, but the pocket book had disappeared. It was held that there was no cause of action against the railroad.[2] In a New York case, cars arriving at an outer street of New York, were disconnected to be drawn by horses, leaving a car standing alone, on which was W, a passenger, with no employee thereon. As W stepped to the door, he was attacked by persons not passengers, and robbed of $16,000 in United States bonds, which he was carrying on his person, without notice to the railroad company. In an action against the company for failing to protect him, it was held that the loss of the bonds could not be considered in fixing the damages.[3]

1 First Nat. Bank *v.* Marietta, etc. R. Co., 20 Ohio St. 259; 5 Am. Rep. 655.

2 Hillis *v.* R. Co., 33 N.W. Rep. 643 (Ia.).

3 Weeks *v.* R. Co., 72 N. Y. 50.

CHAPTER XIX.

THE RESPONSIBILITY FOR ACTS OF OTHERS.

SECTION 290. Passenger Carrier not Bound to Carry Beyond Route.
291. Liability Where He Makes Through Contract.
292. Evidence of Through Contract.
293. Where Means of Transportation Belong to Third Parties.
294. Where Third Parties Use Carrier's Means of Transportation.
295. Where Line in Hands of Trustees.
296. Where Line in Hands of Lessees, Purchasers or Others.
297. Liability of Master for Acts of Servants.
298. Application of Foregoing Rules as Between Carrier and Passenger.
299. Rule of Absolute Liability and Reasons Therefor.
300. Relation of Master and Servant Must Exist.
301. Liability for Acts of Independent Contractors.
302. Liability for Acts of Fellow Passengers and Strangers.

§ 290. **Passenger Carrier Not Bound to Carry Beyond Route.**—A carrier is not bound to sell a passenger a ticket over a connecting line, and the right to do so can only be obtained by agreement or by statutory authority.[1] He may, therefore, where he has such authority, restrict his liability to the end of his own route, and in such case if he sell at the same time a ticket over the connecting line, this will be as agent for the connecting carrier, for whose acts he cannot be made responsible.[2]

[1] Chicago etc. R. Co. *v.* Penn. 1 Inter. Com. Rep. 357; Little Rock etc. R. Co. *v.* R. Co., 2 Id. 454; Kentucky etc. Bridge Co. *v.* R. Co., 37 Fed. Rep. 567; A railroad conductor has no implied authority to collect fare for passage over a connecting line. Haggarty *v.* R. Co., 59 Mich. 366; 60 Am. Rep. 301; 26 N. W. Rep. 639.

[2] Kerrigan *v.* R. Co., 81 Cal. 248; 22 Pac. Rep. 677; Peterson *v.* R. Co., 80 Ia. 92; 45 N. W. Rep. 573; Bethea *v.* R. Co., 26 S. C. 91; Harris *v.* Howe, 74 Tex. 534; 15 Am. St. Rep. 862; 12 S. W. Rep. 224.

§ 291. **Liability Where He Makes Through Contract.** —A carrier of passengers who undertakes to carry a person to a certain destination, is responsible to him as a carrier throughout the whole distance, whether the franchise or means of conveyance at the place the injury occurs, be owned or controlled by him or by some other or connecting carrier.[1] Nor can the first carrier free himself from liability by showing an agreement between the various carriers whose lines constitute the route that each shall be responsible for losses and injuries occurring on his part of the line.[2] And it makes no difference whether the ticket is purchased at one of his stations, or at a station of a contiguous carrier, or of any other authorized agent of the carrier.[3] And though different tickets have been issued by the carrier for the different lines, the passenger may show that the contract for transportation was a through contract, for the reason that the ticket is merely a voucher,[4] and not a contract.[5]

1 Thomp. Carr. Pass. 432; Illinois etc. R. Co. *v.* Copeland, 24 Ill. 337; 76 Am. Dec. 749; Burnell *v.* R. Co., 45 N. Y. 184; Najac *v.* R. Co., 7 Allen, 329; 83 Am. Dec 686; Wilson *v.* R. Co., 21 Gratt. 654; Ward *v.* Vanderbilt, 4 Abb. App. Dec. 521; Williams *v.* Vanderbilt, 28 N. Y. 217; 29 Barb. 491; 84 Am. Dec. 533; Quimby *v.* Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 469; Hart *v.* R. Co., 8 N. Y. 37; 59 Am. Dec. 447; Weed *v.* R. Co., 19 Wend. 534; Candee *v.* R. Co., 21 Wis. 582; 94 Am. Dec. 566; Carter *v.* Peck, 4 Sneed, 203; 67 Am. Dec. 604; Croft *v.* R. Co., 1 McArthur, 492; Balt. etc. R. Co. *v.* Campbell, 36 Ohio St. 647; Balt. etc. R. Co. *v.* Harris, 12 Wall. 65; North. Cent. R. Co. *v.* Schoil, 16 Md. 333; Chollette *v.* R. Co., 26 Neb. 159; 41 N. W. Rep. 1106; Stetler *v.* R Co., 49 Wis. 609; 6 N. W. Rep. 303; Wabash etc. R. Co. *v.* Peyton, 106 Ill. 534. This is the English rule. Kent *v.* R. Co., L. R. 10 Q. B. 1; Mytton *v.* R. Co., 4 Hurl. & N. 614; 28 L. J. (Exch.) 385; Buxton *v.* R. Co., L. R. 3 Q. B. 549; Great West. R. Co. *v.* Blake, 7 H. & N. 986; Birkett *v.* R. Co., 4 H. & N. 730; Thomas *v.* R. Co., L. R. 6 Q. B. 549; In a few states it is held, that a through ticket in the form of several tickets by different connecting carriers is to be regarded as a distinct contract by each carrier to carry over his own line, and no farther. Nashville etc. R. Co. *v.* Sprayberry, 9 Heisk. 852; 35 Am. Rep. 705; Hood *v.* R. Co., 22 Conn. 1; Knight *v.* R. Co., 56 Me. 235; 96 Am. Dec. 449; Furstenheim *v.* R. Co., 9 Heisk. 238; Brooke *v.* R. Co., 15 Mich. 332; Hood *v.* R Co., 22 Conn. 1; Young *v.* R. Co., 115 Pa. St. 112; 7 Atl. Rep. 741.

2 Wilson *v.* R. Co., 21 Gratt. 654; Little *v.* Dusenbery, 46 N. J. (L.) 614.

3 Schopman *v.* R. Co., 9 Cush. 24; Glasco *v.* R. Co., 36 Barb. 551; Chicago etc. R. Co. *v.* Fahey, 52 Ill. 81; 4 Am. Rep. 587;

4 See *ante* § 240.

5 Quimby *v.* Vanderbilt, *supra*; Van Buskirk *v.* Roberts, 31 N. Y. 661.

Where the contract is for through passage, it is not material that the passenger knew of the different ownership of the connecting lines,[1] nor will he be bound by a notice on the ticket that the carrier issuing it will not be responsible for injuries except on his own line.[2]

And as in the case of the carriage of goods, the carrier on whose line the injury occurs, may be sued.[3]

The first carrier may, in any event, be liable for an injury to his passenger caused by the neglect of the servants of a connecting carrier, as for example where A was in the car on a side track of the first carrier at the connecting point of the two roads, and was injured by the negligence of a brakeman of the connecting road in coupling the car to the connecting train.[4]

§ 292. **Evidence of Through Contract.**—The issuing of a ticket to a point on a line beyond his route, is evidence that the carrier has undertaken to carry the passenger to that point.[5] Where several carriers constitute a through line, and fare received for through tickets is accounted for by the first company to the other companies according to a tariff established by

1 Carter *v.* Peck, 4 Sneed. 203; 67 Am. Rep. 604.

2 Central R. Co. *v.* Combs, 70 Ga. 353; 48 Am. Rep. 58; Wilson *v.* R. Co., 21 Gratt. 654; *aliter* where the contract is not a through one. Penn. Co. *v.* Schwarzenberger, 45 Pa. St. 208.

3 Johnson *v.* R. Co., 70 Pa. St. 357; Schopman *v.* R, Co., 9 Cush. 24; Glasco *v.* R. Co., 36 Barb. 557; Chicago etc. R. Co. *v.* Fahey, 52 Ill. 81; 4 Am. Rep. 587; Pennsylvania etc. R. Co. *v.* Schwarzenberger, 45 Pa. St. 208; 84 Am. Dec. 490; Wolf *v.* R. Co., 68 Ga. 653; 45 Am. Rep. 501; Croft *v.* R. Co., 1 McArthur, 492. Even in England where, in the case of goods, the connecting carrier cannot be sued when the contract is a through one, he is liable for an injury to the passenger, on the ground that the connecting carrier having permitted the passenger to travel on his train must see that he is safely carried. Berringer *v.* R. Co., 4 C. P. Div. 163; Foulkes *v.* R. Co., 4 C. P. Div. 267.

4 White *v.* R. Co., 136 Mass. 321.

5 Ill. Cent. R. Co. *v.* Copeland. *supra*; Najac *v.* R. Co., *supra*; Wilson *v.* R. Co., *supra*; Cary *v.* R. Co., 29 Barb. 35; Weed *v.* R. Co., *supra*; Candee *v.* R. Co., *supra*; Carter *v.* Peck, *supra*; Hart *v.* R. Co., *supra*; Louisville etc. R. Co. *v.* Weaver, 9 Lea, 38; 42 Am. Rep. 654; Washington *v.* R. Co., 101 N. C. 239; 7 S. E. Rep. 789. So in England. Kent *v.* R. Co., *supra*; Great West. R. Co. *v.* Blake, *supra*.

each company for itself (there being no division of profits or losses), this is not a partnership so as to make each carrier liable for the acts of the others.[1] Nor does the appointment by them of a common agent to sell tickets for all.[2] A carrier who is authorized by connecting lines to sell tickets over their routes becomes their agent and they are bound by his acts and representations;[3] but he is not responsible for their acts.[4]

§ 293. **Where Means of Transportation Belong to Third Parties.**—A carrier is liable for negligence in the construction, maintenance or operation of any of the appliances or means of transportation which he uses in the carriage of the passenger, although they may belong to and be under the control of others. For example:

(a) The carrier may run his vehicles over the road of another carrier. Here his responsibility is the same as though the road was owned and controlled by him.[5] In an English case the plaintiff purchased a ticket of the defendants, paying his fare to a station beyond the defendants' line, and upon a connecting line. By arrangement between the two companies, the defendants were permitted to use the line of the other company for the transportation of their cars, and the fares

1 Croft *v.* R. Co., 1 McArth. 492.

2 Ellsworth *v.* Tartt., 26 Ala. 733; Atchison etc. R. Co. *v.* Cochran, 43 Kas. 225; 23 Pac. Rep. 151; Hartan *v.* R. Co., 114 Mass. 44.

3 Young *v.* R. Co., 115 Pa. St. 112; 7 Atl. Rep. 741.

4 Harris *v.* Howe, 12 S. W. Rep. 224 (Tex.).

5 Murch *v.* R. Co., 29 N. H. 9; 61 Am. Dec. 631; Seymour *v.* R. Co., 3 Biss. 43; Peters *v.* Rylands, 20 Pa. St. 497; 59 Am. Dec. 746; 1 Phila. 264; McLean *v.* Burbank, 11 Minn. 277; Champion *v.* Bostwick, 11 Wend. 571; 18 Wend. 175, 181; 31 Am. Dec. 376; McElroy *v.* R. Co., 4 Cush. 400; 50 Am. Dec. 794. *Contra*, Sprague *v.* Smith, 29 Vt. 421; 70 Am. Dec. 424, where the reasoning and conclusion of the Court are clearly wrong. See criticism of this case in Thomp. Carr. Pass., 414; Patt. R. Acc. Law 138. See the English cases of Birkett *v.* R. Co., 4 Hurl. & N. 730; Buxton *v.* R. Co., L. R. 3 Q. B. 549; Thomas *v.* R. Co. L. R. 6 Q. B. 226, L. R. 6 Q. B. 266; John *v.* Bacon, L. R. 5 Com. P. 437.

were apportioned between them. The plaintiff continued in the same car throughout the entire journey, and after the train had passed upon the line of the other company, it came into collision with a locomotive left on that line by the servants thereof, injuring the plaintiff. There was no negligence on the part of the driver of the defendants' train. The defendants were held responsible under their implied contract to maintain the line over which the plaintiff must travel in their carriages in a fit condition for traffic.[1] So, where a stage-coach had on its route to cross a ferry, and by the negligence of the proprietors of the ferry the life of a passenger was lost, the owners of the stage-coach were held responsible.[2] The same conclusion was reached where a railroad ran its trains over a bridge belonging to a bridge company, and the fare-taker of the bridge company ordered a passenger to be put off a train on a tressle from which he fell.[3]

(b) Or he may use the vehicles of a third party. Where a railroad brought passengers to one of its stations from a place a mile distant in a stage owned by one D, under a contract with D, and a passenger, while therein proceeding to take the train was injured, the stage being negligently overturned, it was held that the railroad was responsible.[4] The case of drawing

[1] Great West. R. Co. *v.* Blake, 7 H. & N. 987: "This is not," said Cockburn, C. J., "like the case of a stage-coach proprietor, because the road is not in his hands, and he has no means of securing its proper condition. When the contract is entered into, the road would be in a certain condition, without any thing being required to be done on the part of the coach proprietor to keep it in a safe condition. Railway companies ought at least to use due and reasonable care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that is the obligation which attaches to a railway company who undertake to convey passengers through the whole distance on their line; and if by arrangement with another company they convey passengers over the whole or part of another line, the same obligation attaches, and they make the other company their agent, and on their part they undertake that the other company shall keep their line in a proper condition."

[2] McLean *v.* Burbank, 11 Minn. 277.

[3] Union R. Co. *v.* Kallaher, 114 Ill. 325; 2 N. E. Rep. 77.

[4] Buffett *v.* R. Co., 40 N. Y. 168, the Court saying: "There can be no room for doubt that where a corporation undertakes a transportation beyond its

room or sleeping cars, owned by another corporation, but a part of the carrier's train, and provided for such of his passengers as desire extra and better accommodation, belongs here. For defects in such cars, or negligence of the servants of such third parties, the carrier is responsible. Therefore, the action has been sustained against the railroad where the passenger, while in such a car, was injured by an upper berth falling upon his head;[1] where his satchel was lost by the negligence of the sleeping car porter,[2] and where he was assaulted by a drawing room car porter,[3] in the last case the court saying: "The business of running drawing-room cars in connection with ordinary passenger cars, has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare, for the special accommodation afforded by them. They are put on presumably in the interest of the road. They form a part of the train, and the manner of conducting the business, is an invitation by the company to the public to use them, upon the condition of paying the extra compensation charged. Passengers cannot know what private or special arrangement, if any, exists between the company and third

chartered line of railroad, and an injury to the person occurs, through the negligence of their agents, that the corporation is liable in damages. Whether this injury occurred upon another railroad track, or upon a common road used by them in the same business, would seem to be quite unimportant. The principle being established, that they are liable for injuries occurring at the point in question, all else follows. A break or loss of a bridge, often compels a railroad company to transport its passengers a short distance, by stage or boat, around the obstruction. It could not be successfully contended, that they were not bound to care in this transportation, or that they were not responsible for the want of it."

1 Penn. Co. *v.* Roy, 102 U. S. 451; Railroad Co. *v.* Walrath, 38 Ohio St. 461.

2 Kinsley *v.* R. Co., 125 Mass. 54; 28 Am. Rep. 200.

3 Thorpe *v.* R. Co., 76 N. Y. 402; 32 Am. Rep. 325.

persons, under which this part of the business is conducted, and they have, we think, in taking one of these cars, a right to assume that they are there under a contract with the company, and that the servants in charge of the drawing-room cars are its servants. Otherwise, there would be two separate contracts in the case of each passenger in these cars, one with the company and one with Wagner. Such a condition of things would involve a confusion of rights and obligations, and divide a responsibility which ought to be single and definite. Take the case of a passenger in a drawing-room car, who should be burned by the negligent upsetting or breaking of a lamp by the porter, or the case of a passenger in a sleeping car, injured by the porter's negligence. Is the passenger, in these or other similar cases which might be supposed, to be turned over, for his remedy, against Wagner, on the ground that the servant who caused the injury was his servant, and not the defendant's? The public interest and due protection to the rights of passengers require that the railroad company, which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon, should, as to passengers, be deemed to be the servants of the corporation."

(c) Or the carrier may use in the course of the journey the station or landing place of another carrier. Where a passenger on defendant's train slipped upon some pieces of ice on the station platform and injured himself, it was held that it was the defendant's duty to see that the platform was safe for its passengers, regardless of the fact that the building and platform were not owned by it, but by another company.[1]

[1] Seymour *v.* R. Co., 3 Biss. 43; and see Gruber *v.* R. Co., 92 N. C. 1.

(d) Or he may do a portion of the service for others. Where a railroad receives upon its track the cars of another carrier, placing them under the control of its agents and servants, and drawing them by its locomotives over its own road to their place of destination, it assumes towards the passengers coming upon its road in such cars the relation of a carrier of passengers, with all the liabilities incident to that relation.[1] So, where a carrier by water, chartered one of his boats to another carrier for a single trip, but retained charge of it, and navigated it with his own master and crew, he was held liable to a passenger upon this trip.[2]

§ 294. **Where Third Parties Use Carrier's Means of Transportation.**—Where a railroad permits others to use its line or means of transportation, it is liable to passengers for the negligence of such others.[3] The reason is that the carrier who has been invested with his franchise for public purposes, cannot be permitted to derive a profit therefrom at an enhanced risk to his passengers, without additional responsibility.[4] In a Missouri case,[5] where this principle was applied, an action was brought against a railroad for injuries to a person not a passenger, through the negligence of one M, to whom the railroad company had, by contract, delegated the entire charge and control of its freight business at the St. Louis station. In the course of this work the servants of M negligently backed a car against the plaintiff. The railroad was held liable. "He (M)," said the court, "was transacting a part of

1 Schopman *v.* R. Co., 9 Cush. 24; 55 Am. Dec. 42; Clymer *v.* R. Co., 5 Blatchf. 317; Nashville etc. R. Co. *v.* Carroll, 6 Heisk. 347; Fletcher *v.* R. Co., 1 Allen, 9.

2 Campbell *v.* Perkins, 8 N. Y. 430.

3 Barron *v.* R. Co., 1 Biss. 453; Railroad Co. *v.* Barron, 5 Wall. 90; McElroy *v.* R. Co., 4 Cush. 400; 50 Am. Dec. 795; Mobile etc. R. Co. *v.* Mayes, 49 Ga. 355; Armett *v.* Foster, 1 Daly 100; Gardner *v.* Smith, 7 Mich. 422.

4 Thomp. Carr. Pass., 414.

5 Speed *v.* R. Co., 71 Mo. 303.

the business of the company, a common carrier, not as a lessee of the road and rolling stock, or either, but simply in loading and unloading freight which the company transported as a common carrier. As a common carrier, the law imposes certain obligations and liabilities upon the defendant, of which it is extremely doubtful whether it can relieve itself while it continues to be a common carrier, by any agreement with a third person. The doctrine might well apply that, where the law imposes a liability upon a company, in which it vests a franchise with exclusive privileges, it cannot escape responsibility by delegating to others the power to transact a portion of the business in which it is engaged, if the business to be transacted by the employee, be but a part of the general business in which the company is engaged." Where, however, another railroad uses the carrier's line under statutory authority, and without his consent, the latter is not liable for its negligence,[1] though if the carrier himself be negligent, the fact that the other railroad was also negligent, will not save him from liability.[2]

§ 295. **Where Line in Hands of Trustees.**—A railroad company has no power (in the absence of express authority[3]) to mortgage its franchise or line.[4] Where, however, the mortgage has been legally authorized, and the trustees thereunder have taken possession of the property of the railroad, it is not liable for the negligent acts of the trustees or their servants or agents,[5] but the trustees are in such case liable.[6]

1 Thomas *v.* R. Co., L. R. 5 Q. B. 226; L. R. 6 Q. B. 266; Wright *v.* R. Co., L. R. 8 Ex. 137; Taylor *v.* R. Co., L. R. 1 C. P. 385.

2 McElroy *v.* R. Co., *supra.*

3 Given the power to mortgage its road it may mortgage any part of it. Pullan *v.* R. Co., 4 Biss. 335.

4 Com. *v.* Smith, 10 Allen, 488; 87 Am. Dec. 672; Richardson *v.* Sibley, 11 Allen, 65; 87 Am. Dec. 700; Carpenter *v.* Mining Co., 65 N. Y. 43; Atkinson *v.* R. Co., 15 Ohio St. 21.

5 State *v.* R. Co., 67 Me. 479.

6 Sprague *v.* Smith, 29 Vt. 421; 70 Am. Dec. 424; Smith *v.* R. Co., 124 Mass. 157; Linfield *v.* R. Co., 10 Cush. 562; 57 Am. Dec. 124; McCall *v.* Chamberlain, 13 Wis.

A railroad company in the hands of, and operated by a receiver, or assignee in bankruptcy, is not responsible for the negligence of the receiver or his agents or servants.[1] The possession of the receiver is not regarded as the possession of the company, but rather as the possession of the court which appointed him;[2] and as the possession has been taken from the company and its control given to another over whom it has no control, the latter should respond for any injuries which he or his agents or servants may commit.[3] "A receiver appointed by a court of equity to hold, manage, and operate an insolvent railroad is not the agent of the insolvent railroad corporation, and is not a substitute for the board of directors. He is but the hand of the court appointing him, and holds, manages, and operates the property under the orders and directions of the court as its custodian, and not for or under the control of the directors or shareholders of the corporation. His management is for the benefit of those ultimately entitled under decree of the court. His acts are not the acts of the corporation, and his servants are not the agents or servants of the corporation. The receivers, as such, are liable for their negligent acts. Both to the public and to employes, they stand responsible to the full extent of the earnings resulting from their management, and, under some circumstances, the property itself may constitute a fund which may be reached and subjected by those sustaining injuries.

641; Barter *v.* Wheeler, 49 N. H. 9; 6 Am. Rep. 434; Rogers *v.* Wheeler, 43 N. Y. 598; Lamphaer *v.* Buckingham, 33 Conn. 237. See Ballou *v.* Farnum, 9 Allen, 47.

1 Turner *v.* R. Co., 70 Mo. 603; Kain *v.* Smith, 80 N. Y. 473; Bell *v.* R. Co., 53 Ind. 58; Memphis etc. R. Co. *v.* Strangfellow, 44 Ark. 322; State *v.* R. Co., 115 Ind. 466; 17 N. E. Rep. 909; Godfrey *v.* R. Co., 116 Ind. 30; 18 N. E. Rep. 61; Daws *v.* Duncan, 19 Fed. Rep. 477; Thuman *v.* R. Co., 56 Ga. 376; Railroad Co. *v.* Humphreys, 145 U. S. 82.

2 Ohio etc. R. Co. *v.* Davis, 23 Ind. 553; 85 Am. Dec. 477.

3 Blumenthal *v.* Brainerd, 38 Vt. 402; 91 Am. Dec. 349; Metz *v.* R. Co., 58 N. Y. 61; 17 Am. Rep. 201; Meara *v.* Holland, 20 Ohio St. 145; Paige *v.* Smith, 99 Mass. 376; Smith *v.* R. Co., 124 Mass. 157.

But we know of no legal principle which would justify a court in holding a corporation, which is excluded from all control and management, responsible for the torts of such receivers, or for the negligent acts of their servants. The relation of master and servant does not exist between the excluded corporation and the servants of the receivers. If the possession of the receivers be exclusive, as was the case under the decree appointing them, the corporation can neither employ, discharge, nor control such servants; and it would be a gross injustice to say that, under such circumstances, it should be liable for the conduct of servants which it neither employed nor controlled."[1] It is, of course, in his representative capacity, and not personally, that the receiver is liable for the acts of his employes,[2] and he can be sued only in his official character in the court where he is appointed or in any other court, by the leave of the appointing court.[3]

§ 296. **Where Line in Hands of Lessees, Purchasers, or Others.**—A railroad cannot escape responsibility by leasing its line to another corporation, and where such a lease is made, either lessor or lessee may be sued for injuries received through the negligent operation of the road by the lessee.[4] To allow the lessor to escape responsibility in this way would

[1] Memphis, etc. R. Co. *v.* Hoechner, 67 Fed. Rep. 456.

[2] Cardot *v.* Barney, 63 N. Y. 281; 20 Am. Rep. 533; Camp *v.* Barney, 4 Hun, 373; Little *v.* Dusenberry, 46 N. J. (L.) 614; 50 Am. Rep. 445; Hopkins *v.* Connell, 2 Tenn. Ch. 323; Brown *v.* Brown, 71 Tex. 355; *ex parte* Brown, 15 S. C. 518; Pope's Case, 30 Fed. Rep. 169; Winbourns Case, 30 Fed. Rep. 167

[3] Thompson *v.* Scott, 4 Dill. 508; Davis *v.* Gray, 16 Wall. 203; Parker *v.* Browning, 8 Paige, 388; 35 Am. Dec. 717; Heath *v.* R. Co., 83 Mo. 617; Graffenreid *v.* R. Co., 57 Ga. 22; Kennedy *v.* R. Co., 3 Fed. Rep 97.

[4] Railroad *v.* Barron, 5 Wall. 90; York etc. R. Co. *v.* Winans, 17 How. 30; West. etc. R. Co. *v.* Brown, 17 Wall. 445; Freeman *v.* R. Co., 28 Minn. 443; Chicago etc. R. Co. *v.* Whipple, 22 Ill. 165; Nelson *v.* R. Co. 26 Vt. 717; 62 Am. Dec. 614; Rockford etc. R. Co. *v.* Heflin, 65 Ill. 366; Ill. Cent. R. Co. *v.* Finnegan, 21 Ill. 648; Bay City etc. R. Co. *v.* Austin, 21 Mich. 390; Liddle *v.* R. Co., 23 Ia. 377; Rickerts *v.* R. Co., 10 South. Rep. 801 (W. Va.); Gardner *v.* R. Co., L. R. 2 Ch. 201.

tempt him to put his road in the hands of persons of no responsibility.[1] "It cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the state, by the voluntary surrender of its road into the hands of lessees."[2] Where, however, the lease is made under an express power given by the legislature, the lessor is not liable for the negligent acts of the lessee,[3] unless, notwithstanding the lease, it continues to operate the road,[4] or allows it to be operated in its corporate name.[5] Though the law as laid down in the last sentence is supported by the authorities there cited and probably by others, yet it is denied in a number of cases that a mere power given by the State to a railroad to lease its line, absolves the lessor from any further liability.[6] This view is vigorously supported in a late case in North Carolina,[7] where the court say: "It is contended that the authority to lease being conceded, its exercise by necessary implication absolved the lessor company from all liability during the term, for injuries caused by the negligence of the lessee in operating it. Is such an implication necessarily involved in the grant of power to lease? Or must it appear that the State has, in express terms, released the lessor from the duties and

1 Nelson *v.* R. Co., 26 Vt. 717; 62 Am. Dec. 614. "If such leases may be made and the effect claimed results from them, railroads may avoid all liability to the public. And if such leases should be to irresponsible persons, the remedies for wrongs inflicted, duties omitted and contracts violated by the lessee would not be worth pursuing." Ohio etc. R. Co. *v.* Dunbar, 20 Ill. 623.

2 West. etc. R. Co. *v.* Brown, 17 Wall. 445; Stevens *v.* Dawson, 18 Gratt. 819; 98 Am. Dec. 692; Troy etc. R. Co. *v.* Kerr, 17 Barb. 581; Abbott *v.* R. Co., 80 N. Y. 27; 36 Am. Rep. 572; Black *v.* Canal Co., 22 N. J. (Eq.) 399; Lakin *v.* R. Co., 13 Oreg. 436; 57 Am. Rep. 25.

3 Mahoney *v.* R. Co., 63 Me. 68; Ditchett *v.* R. Co., 67 N. Y. 425; Linfield *v.* R. Co., 10 Cush. 562; 57 Am. Dec. 124; Arrowsmith *v.* R. Co., 57 Fed. Rep. 178; Byrne *v.* R. Co., 61 Fed. Rep. 605; *contra*, Singleton *v.* R. Co., 70 Ga. 464; and see Whitney *v.* R. Co., 44 Me. 362; 69 Am. Dec. 103. The statutes of the states generally allow the leasing of other roads. See Lawson Rights, R. & Pr. § 549.

4 Ballou *v.* Farnum, 9 Allen, 47.

5 Bower *v.* R. Co., 42 Ia. 546; Singleton *v.* R. Co., *supra*.

6 1 Spell. Priv. Corp. § 135.

7 Logan *v.* R. Co., 21 N. E. Rep. 959.

obligations which devolved upon it in its very creation, and which constituted the consideration for clothing it with nominal corporate powers? Upon this question the authorities are conflicting, and, as it is presented for the first time here, it is our privilege and our duty to be governed, not by the number of cases cited on the one side or the other, but rather by the soundness of the reasoning upon which they rest. After conferring upon a corporation the right of eminent domain, with many other special privileges which the legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe, as well as speedy transportation for themselves and their property, the State cannot be held to have abdicated its right to protect the patrons of the road, who are under its care, by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself, and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs or defaults. As we have intimated, the decisions of the courts of different States, and sometimes those of the same States, are conflicting, and we do not pretend to be governed by the greater number, but the greater weight of the reasons given to sustain them. No matter how many leases and subleases may be made, the law attaches to the actual exercise of the privilege of carrying passengers and freight, the compensatory obligation to the public to use ordinary care for the safety both of persons and property so transported.[1] On the other hand, the carrier, who simply substitutes, with the consent of the State, another in his place, cannot establish his own right of exemption from responsibility for the

[1] Spel. Priv. Corp. § 134.

wrongs of the substitute, unless he can show not only explicit authority to lease the property, but to rid himself of such responsibility.[1] Where the legislature gives its express sanction to the release of the lessor company from liability, there can be no question that it is exempt.[2] Of the two or three reasons assigned for holding that the lessor company is liable for the torts of a lessee, where it has legislative authority to demise its road, but there is no express provision for its own exemption, we prefer to rest our ruling upon the ground that the original grant of extraordinary privileges still carries with it a correlative obligation to perform the duties which were in contemplation of the State and the corporation when the charter was enacted. The legislature is warranted in granting such exclusive privileges only in consideration of services to be rendered to the public. While the compensatory obligation to use ordinary care in providing for the safety of persons and property committed to its care as a carrier, inheres in and attaches to the exercise of the corporate rights by the lessee, we think that, without the express sanction of the legislature, the lessor is not relieved by any implication arising out of the general power to lease, but still remains subject to its original liability. When the State exercises its supreme and exclusive power in delegating to a corporation the right upon the payment of just compensation to take it for public purposes, the company holds its interest in the land solely for corporate purposes, and subject to the right of the sovereign, if it fail to discharge its public functions, to institute proper proceedings, and have it dissolved. In case of dissolution, it seems that the property and franchise

[1] Singleton *v.* R. Co., *supra.*

[2] Braslin *v.* R. Co., 145 Mass. 64; 13 N. E. Rep. 65.

may be sold for the benefit of creditors, and devoted to the same, or diverted to some other public purpose, and that there is a bare possibility of reverter. Where the interest of the lessor company in the land condemned is limited to the right to use for corporate purposes, and its franchise, which frequently expires in a term of years, is subject to forfeiture, in case of misuser or nonuser of its powers, we fail to trace any such analogy between it and its lessee as exists between a landlord, who is owner of the fee, and his lessee for years. Yet, upon this supposed analogy, many of the courts have held that the liability of the railway company that demises its road, like that of a landlord, extends no further than the obligation to use ordinary care in keeping the track, roadbed, right of way, station houses, and other permanent structures in such condition that the safety of the public will not be imperiled by them, while the lessee is solely answerable for injuries caused by negligence in running trains, or the use of defective machinery. A part of the original obligation of the lessor company to the public was to furnish such trains and other appliances as would be necessary to provide for the safety of the passengers as well as the employes who should travel on its cars, and we see no reason why that duty should not exist, like that to look after the roadbed, till the legislature, for the sovereign, declares the lessor absolved from it."

The purchasers of a railroad, take, with all its assets, the liabilities of the road, for previous personal injuries;[1] but if the purchase be made under judicial proceedings, as at a judicial sale under a foreclosure of a mortgage, the rule is different.[2]

[1] Railroad v. Boring, 51 Ga. 582. And the assignor is not of course liable for subsequent injuries. Wellsborough etc. Co. v. Griffin, 57 Pa. St. 417.

[2] Metz v. R. Co., 58 N. Y. 61; 17 Am. Rep. 201. The purchaser may however be made liable by statute. St Louis etc. R. Co. v. Miller, 43 Ill. 199; Hatcher v. R. Co., 62 Ill. 477.

"And there can be no question that a mere intruder into the franchise of a railway corporation, who should continue to use it for his own benefit, would be liable to passengers and the owners of freight, who should employ him, to the same extent precisely as the company itself, while continuing the same business."[1]

§ 297. **Liability of Master for Acts of Servants.** —It is a well-known principle that a master is civilly responsible for the acts of his servants which cause injury to third persons.[2] This principle is expressed in the maxim *respondent superior*, and is subject to the following qualifications and explanations, viz.:

Qual. 1. The act which caused the injury must have been within the scope of and done in the exercise of the authority given either expressly or impliedly, to the servant by the master.[3]

Illustrations.

I. A orders his servant B to take his A's horse and drive to a certain place. B executes the order and then drives to another place on some business of his own, and while so driving negligently injures a person. A is not liable.[4]

II. A orders his servant to build a fire. Instead of doing so he attempts to clean out a chimney and burns down a house. A is not liable.[5]

III. M is employed by a sleeping car company as porter on a car. While passing a station he throws a bundle of his own clothes out of the car window, having arranged previously with a friend to be on hand and receive them. The bundle strikes a person (not a passenger) who is standing on the station platform. The company is not responsible.[6]

In case I. the injurious act of B was not within the scope of his authority, which was to drive on one par-

1 Sprague *v.* Smith, 29 Vt. 421; 70 Am. Dec. 424.

2 It is too elementary to require a citation of any of the great mass of decisions in which it is recognized. The authorities may be found collected in Laws. Rights, R. & Pr. § 291.

3 Towanda Coal Co. *v* Heeman, 86 Pa. St. 418; Aycrigg *v.* R. Co., 30 N. J. (L.) 460; Oxford *v.* Peter, 28 Ill. 434; Golden *v.* Newbrand, 52 Ia. 59; 35 Am. Rep. 257; Stone *v.* Hills, 45 Conn. 44; 29 Am. Rep. 635.

4 Sheridan *v.* Charlock, 4 Daly, 338; Maddox *v.* Brown, 71 Me. 432; 36 Am. Rep. 336; Cavanaugh *v.* Dinsmore, 12 Hun. 465.

5 McKenzie *v.* McLeod, 10 Bing. 385.

6 Walton *v.* R. Co., 139 Mass. 536.

ticular errand, nor was it done in the exercise of that authority, but after the authority had been executed. In case II. it was said by Alderson, J., that where something is directed to be done, and the manner of doing it is left wholly to the discretion of the servant, the judgment exercised by him in doing it is the judgment of the master, and the latter is liable for it. "But where he has neither ordered the thing to be done nor allowed the servant any discretion as to the mode of doing it, I cannot see how, in common justice or common sense, the master can be held responsible." In case III. the court said: "There was no evidence that M was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment, and it is wholly immaterial that he was at the moment riding on a car of the defendant, in which he was employed by it for other purposes."

Expl. 1. If the case falls within qual. 1, it does not affect the master's liability, that he did not order or know of the doing of the act.

Illustration.

I. The servants of a farmer are working in a field. A cow breaks through a fence, and one of them in driving the animal out kills it with a stone. The master is liable.[1]

In case I. it was held that the act of driving out the cow was clearly within the implied authority of the servant. "To do such an act for the preservation of a growing crop, every farmer would reasonably contemplate and have a right to expect as a matter of duty from the servant. * * * Therefore, the fact that the master gave no express direction as to driving out the cattle, and did not know of their being in it until

[1] Evans *v.* Davidson, 53 Md. 245; 36 Am. Rep. 401.

after the doing of the injury complained of, will not avail to exonerate the master." So, if the carrier's servant makes a mistake in the carrying out of his orders, the carrier is liable for the consequences, as where the passenger tenders the legal fare which the conductor erroneously thinks not enough, and ejects him,[1] or the conductor thinks he has not paid his fare when he has;[2] or the station superintendent mistakingly believes a passenger is a person soliciting custom.[3]

Expl. 2. Nor that in doing the act, or in carrying out the master's orders, the servant was acting contrary to the express commands of the master.[4]

Illustrations.

I. An omnibus company by written instructions orders its drivers in no case to race with, molest or obstruct any other omnibus. A driver obstructs another omnibus with the result that it is upset and injured. The omnibus company is liable to the owner of the injured omnibus.[5]

II. A kept a gun store and B was his clerk, who had been ordered never to load a gun in the store. A being absent, B in showing a gun to a customer loaded it and it was accidentally discharged, wounding C. A was held liable.[6]

In case I. the court said that although the driver had acted in flat disobedience to his express orders, yet he had acted in the course and scope of his employment. In case II. it was said: "B was unquestionably aiming to execute the order of his principal or master. He was acting within the scope of this authority and engaged in furtherance of his master's business.

1 Cinn. etc. R. Co. *v.* Cole, 29 Ohio St. 126; 23 Am. Rep. 729.

2 Moore *v.* R. Co., 4 Gray, 465; 64 Am. Dec. 83.

3 Hall *v.* Power, 12 Metc. 482.

4 Powell *v.* Deveney, 3 Cush. 300; 50 Am. Dec. 738; Haach *v.* Fearing, 5 Robt. 528; 35 How. Pr. 459; Garretzen *v.* Duenckel, 50 Mo. 104; 11 Am. Rep. 405; Southwick *v.* Estes, 7 Cush. 385; Duggins *v.* Watson, 15 Ark. 118; Paulmier *v.* R. Co., 34 N. J. (L.) 151; Toledo etc. R. Co. *v.* Harmon, 47 Ill. 298; Higgins *v.* R. Co., 46 N. Y. 23; Minter *v.* R. Co., 41 Mo. 503.

5 Limpus *v.* London Gen. Om. Co., 32 L. J. (Ex.) 34.

6 Garretzen *v.* Duenckel, 50 Mo. 104; 11 Am. Rep. 405.

There is no pretense that he was endeavoring to do anything for himself. He was acting in pursuance of authority, and trying to sell a gun, to make a bargain for his master, and in his eagerness to subserve his master's interests he acted injudiciously and negligently. It makes no difference that he disobeyed instructions. Innocent third parties who are injured in consequence of his acts cannot be affected thereby." So though the carrier may have ordered his servants to keep the station rooms in fit condition for passengers and not to allow them to become otherwise, yet if the servants permit the rooms to become filled with tobacco smoke to the inconvenience of a passenger[1] or fail to heat them in cold weather whereby a passenger takes cold,[2] the carrier will be liable.

Expl. 3. In regard to the wanton, willful or malicious acts of the servant, there is a conflict of authority. The older rule is that a servant can never have an implied authority to commit a willful act or a crime,[3] and even though he does it while about his master's business, the master is not responsible,[4] unless he had previously ordered it or afterwards ratified it.[5] This doctrine has been often criticised and condemned,[6] and the better supported rule is that a servant authorized to do an act, and acting in the general scope of his authority in the master's business, makes the master liable therefor, although he did so willfully

1 McDonald *v.* R. Co., 26 Ia. 138.

2 Tex. etc. R. Co. *v.* Cornelius, 30 S. W. Rep. 720 (Tex.).

3 McManus *v.* Crickett, 1 East, 106.

4 Vanderbilt *v.* Turnpike Co., 2 N. Y. 479; 51 Am. Dec. 315; Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill 481; Wright *v.* Wilcox, 19 Wend. 343; 32 Am. Dec. 507; Fraser *v.* Freeman, 43 N. Y. 566; 3 Am. Rep. 740; Cavanaugh *v.* Dinsmore, 12 Hun, 468; Hagerstown Bk. *v.* Adams Ex. Co., 45 Pa. St. 419; 84 Am. Dec. 477; Ware *v.* Canal Co., 15 La. 169; 35 Am. Dec. 189; McCoy *v.* McKowan, 26 Miss. 487; 59 Am. Dec. 264.

5 Moore *v.* Sanborne, 2 Mich. 519; 59 Am. Dec. 209; Brown *v.* Pruveance, 2 H. & G. 316; Lindsay *v.* Griffin, 22 Ala. 629; Bass *v.* R. Co., 39 Wis. 636; 42 Wis. 654; Gosway *v.* R. Co., 58 Ga. 216.

6 2 Thomp. Neg. 886; Reeve Dom. Rel. 640; Cooley on Torts, 535; Wood Mast. & Ser., § 303.

or with malice towards the injured person.[1] If he is authorized to use force against another, when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and uses excessive force, he cannot be said to have been acting without the line of his duty, or to have departed from his master's business.[2]

Expl. 4. "If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. And, where it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not

1 Carter *v.* R. Co., 98 Ind. 552; 49 Am. Rep. 780; Fraser *v.* Freeman, 43 N. Y. 566; 3 Am. Rep. 740; Chicago etc. R. Co., *v.* Dickson, 63 Ill. 151; 14 Am. Rep. 114; Korah *v.* Ottawa, 32 Ill. 121; 83 Am. Dec. 255; New Orleans etc. R. Co. *v.* Allbritton, 38 Miss. 242; 75 Am. Dec. 78; Moore *v.* R. Co., 4 Gray 465; 64 Am. Dec. 83; Powell *v.* Deveney, 3 Cush. 300; 50 Am. Dec. 738; Hawes *v.* Knowles, 114 Mass. 518; 19 Am. Rep. 383; Bryant *v.* Rich, 106 Mass. 180; 8 Am. Rep. 311; Sherley *v.* Billings, 8 Bush. 147; 8 Am. Rep. 451; Diggins *v.* Watson, 15 Ark. 118; 11 Am. Dec. 561; Redding *v.* R. Co., 3 S. C. 1; 16 Am. Rep. 681; Nashville etc. R. Co. *v.* Starnes, 9 Heisk. 52; 24 Am. Rep. 297.

2 Rounds *v.* R. Co., 64 N. Y. 136; Shultz *v.* R. Co., 89 N. Y. 242; Higgins *v.* R. Co., 46 N. Y. 23; Sanford *v.* R. C., 23 N. Y. 343; Hewitt *v.* Swift, 3 Allen, 420; Holmes *v.* Wakefield, 12 Allen, 580; Moore *v.* R. Co., 4 Gray, 465; Coleman *v.* R. Co., 106 Mass. 160; Cohen *v.* R. Co., 69 N. Y. 170; Chicago etc. R. Co. *v.* Parks, 18 Ill. 460; St. Louis etc. R. Co. *v.* Dalby, 19 Ill. 353; Brokaw *v.* R. Co., 3 Vroom, 328; Jackson *v.* R. Co. 47 N. Y. 274; Kline *v.* R. Co., 39 Cal. 557; 37 Cal. 400; Marquette *v.* R. Co., 33 Ia. 562; Carter *v.* R. Co., 98 Ind. 522; Benton *v.* R. Co., 55 Ia. 496; Johnson *v.* R. Co., 58 Ia. 348; Seymour *v.* Greenwood, 7 H. & N. 354. The *reductio ad absurdam* of the older rule applied to this kind of a case will be found in the instruction of an Illinois trial judge who told the jury that if a conductor of a train was authorized to remove persons who refused to pay fare, and used only so much force as was necessary the company would not be liable for the act was proper, but if he used excessive force the company would not be liable for the use of excessive force was the conductor's act and not the act of the company. St. Louis etc. R. Co. *v.* Dalby, *supra.*

done with a view to the master's service, or for the purpose of executing his orders."[1]

§ 298. **Application of Foregoing Rules as Between Carrier and Passenger.**—All the cases agree that the carrier of passengers is responsible for the acts of his servants within the scope, and done in the exercise of his delegated authority, and that it matters not that the act was done without the knowledge or orders of the carrier, or even contrary to his instructions;[2] and that so long as the servant acts within the scope of his employment, and is engaged in executing his master's orders, the carrier is liable, whether the servant's act be merely negligent, or was willful, wanton and malicious.[3] And applying the principles of the last section (*Expl. 3*), a carrier of passengers is liable in damages for the act of his servant—a railroad conductor, for example, in using unnecessary force, and committing an assault in ejecting a passenger[4] for a

1 Rounds *v.* R. Co., 64 N. Y. 136; 21 Am. Rep. 597. This is said in Ill. Cent. R. Co. *v.* Latham, 16 South. Rep. 757 (Miss.) to be "an admirable statement of the law."

2 Passenger R. Co. *v.* Young, 21 Ohio St. 518; 8 Am. Rep. 78.

3 Passenger R. Co. *v.* Young, 21 Ohio St. 518; 8 Am. Rep. 78; Ind. etc. R. Co. *v.* Anthony, 43 Ind. 183; Jeffersonville etc. R. Co. *v.* Rogers, 38 Ind. 116; 10 Am. Rep. 103; Hewett *v.* Swift, 3 Allen, 420; Pittsburg etc. R. Co. *v.* Slusser, 19 Ohio St. 157; McKinley *v.* R. Co., 44 Iowa, 314; 24 Am. Rep. 748; Ptitsburgh etc. R. Co. *v.* Theobald, 51 Ind. 245; Drew *v.* R. Co., 26 N. Y. 49; Northwestern R. Co. *v.* Hack, 66 Ill. 238; Quigley *v.* R. Co., 11 Nev. 350, 363; 21 Am. Rep. 757; Atlantic etc. R. Co. *v.* Dunn, 19 Ohio St. 162; 2 Am. Rep. 382; New Orleans etc. R. Co. *v.* Hurst, 36 Miss. 660; 74 Am. Dec. 785; Bayley *v.* R. Co., L. R. 7 Com. P. 415; Travers *v.* R. Co., 63 Mo. 121; Baltimore etc. R. Co. *v.* Blocher, 27 Md. 277; Brown *v.* R. Co., 66 Mo. 588; Thorpe *v.* R. Co., 13 Hun. 70; Jackson *v.* R. Co., 47 N. Y. 274; 7 Am. Rep. 448; Moore *v.* R Co., 4 Gray, 465; 64 Am. Dec. 83; Rounds *v.* R. Co., 64 N. Y. 129; 21 Am. Rep. 597.

4 Penn. R. Co. *v.* Vandiver, 42 Pa. St. 365; 82 Am. Dec. 520; Moore *v.* R. Co., 4 Gray, 465; Ramsden *v.* R. Co, 104 Mass. 117; 6 Am. Rep. 201; Wabash etc. *v.* R. Co. *v.* Rector, 104 Ill. 296; Pass. R. Co. *v.* Young, 21 Ohio St. 518; Peck *v.* R. Co., 70 N. Y. 587; Sanford *v.* R. Co., 23 N. Y. 343; 80 Am. Dec. 286; 286; English *v.* R. Co.. 66 N. Y. 454; Hanson *v.* R. Co., 62 Me. 84; 16 Am. Rep. 404; Higgins *v.* Waltevliet Tpk. Co., 46 N. Y. 23; 7 Am. Rep. 293; McKinley *v.* R. Co., 44 Ia. 341; Coleman *v.* R. Co., 106 Mass. 160; Kline *v.* R. Co., 37 Cal. 400; 39 Cal. 587; Brown *v.* R. Co., 66 Mo. 588; Holmes *v.* Wakefield, 12 Allen, 580; 90 Am. Dec. 171; New Jersey Steam Co. *v.* Brockett, 121 U. S. 637; West, etc. R. Co. *v.* Turner, 72 Ga. 292; 53 Am. Rep. 842.

proper cause, or for arresting him or imprisoning him on a criminal charge.[1]

The question, however, as to whether the principle stated in *cæpl. 4* can be invoked to relieve the carrier from responsibility in an action by a passenger is one upon which there is a difference of opinion. Some of the cases hold that it may, and that where the injury done by the servant is committed not with a view of executing the master's orders, but for his own (the servant's) malicious purpose, the carrier is not responsible. Thus, where a baggagemaster and a passenger got into a quarrel over the checking of the passenger's trunk, and the former struck him with a hatchet;[2] where a female passenger on a street car went to the platform and asked the conductor to stop as she wanted to get off, to which he replied that the car was stopped enough, and she said she would not get off until it came to a full stop, whereupon he seized her and threw her from the car, breaking her leg,[3] it was

[1] Lafitte *v.* R. Co., 42 La. Ann. 160; Gillingham *v.* R. Co., 14 S. E. Rep. 242 (W. Va.); Lynch *v.* R. Co., 90 N. Y. 77; 43 Am. Rep. 141; Galveston etc. R. Co. *v.* Donohoe, 56 Tex. 162.

[2] Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110; 2 Am. Rep. 373.

[3] Isaacs *v.* R. Co., 47 N. Y. 122; 7 Am. Rep. 419. The reports will be searched in vain for a decision, in both its reasoning and conclusion so weak, illogical and unjust as this. One reason given is that "the defendant could not lawfully have done it (*i. e.* throw a passenger from a moving car) and therefore no authority could be implied in the conductor to do it." The facility it has been well said by an eminent writer (Thomp. Carr. Pass. 366) with which the gordian knot of respondeat superior is thus cleft to the heart must be startling even to the superficial thinker. If we are to assume that a corporation can do no wrong, then it would seem to be useless to discuss whether the wrongs of its agents can be imputed to it. The judge who delivered the opinion did not apparently notice that the plaintiff was a passenger. On almost similar facts (except that the plaintiff was not a passenger) in a later case in the same court the master was held liable and an effort was made to "distinguish" the two cases. Shea *v.* R. Co., 62 N. Y. 180. It is clearly overruled by all the subsequent cases in New York, and is entirely irreconcilable with several earlier ones. See Rounds *v.* R. Co., 64 N. Y. 129; Cohen *v.* R. Co., 69 N. Y. 170; Jackson *v.* R. Co., 47 N. Y. 274; Meyer *v.* R. Co., 8 Bosw. 305; Higgins *v.* Turnpike Co., 46 N. Y. 23; Sandford *v.* R. Co., 23 N. Y. 343; Weed *v.* R. Co., 17 N. Y. 362; Thorpe *v.* R. Co., *post*; Dwinelle *v.* R. Co., *post*. The cases of Parker *v.* R. Co., 5 Hun, 57 and Priest *v.* R. Co., 65 N. Y. 589, likewise conflict with the latest decisions of the highest court of that state.

held that the carrier was not liable, and there is a *dictum* to the same effect in Missouri.[1]

In accord with the course of reasoning in these cases, Mr. Browne[2] raises the question whether the carrier should be held responsible for a latent defect in a servant, which may exist in men just as well as in vehicles, and he says: "A latent defect in the making of a manufactured article is one which no care can avoid and which no inspection could have discovered. It seems to us that under such circumstances an accident arising from such a defect might with justice be considered as due to the act of God, and therefore one of those casualties against which the carrier does not insure. The fact that it arises from the inside, as from a flaw in welding of a wheel tire caused by an air bubble,[3] instead of from the outside, as from a storm of wind, a flash of lightning, or the attack of overwhelming enemies, seems to us to make no manner of difference. It is the inevitability and the unavoidability which is the point to be considered. If no human care or ability could in the present condition of knowledge have averted the catastrophe, it would be absurd upon every ground to hold the person responsible. If, then, a man may select a wheel with a defect in it, which may cause an accident for which he will not be held responsible, so it seems to us may a master select a servant with a latent defect, concerning which he can know nothing and can procure no information—as, for instance, a hereditary tendency to insanity, a liability of epileptic or cataleptic seizures—through which, if an accident occurred, he could not with justice be regarded as in any way responsible. To our knowledge

[1] McKeon *v.* R. Co., 42 Mo. 79. But see Malecek *v.* R. Co., 57 Mo. 18; 28 Pac. Rep. 977.

[2] Carr. § 617.

[3] Readhead *v.* R. Co., *ante.*

the doctrine of latent defects has not as yet been acknowledged as applicable to this branch of the law of carriers." No case seems to have arisen in England in which this question has been presented. In a Kansas case however, a passenger purchased a ticket at a ticket office from a station agent who at the time was affected with small-pox, and the passenger took the disease from him. The carrier was held not liable, mainly on the ground that the carrier had no knowledge of the agent's condition.[1] But it is difficult to see where the misconduct of the agent in exposing a passenger to a dangerous disease differs from his misconduct in exposing him to any other kind of personal injury.

These cases leave out of view the relation of the carrier and passenger, and the legal duties due from the former to the latter. The carrier has agreed with the passenger to carry him safely and securely, and in so doing to use the highest degree of care in the furnishing and equipment of his vehicles and means of transportation, and in their management. Nor is this all, but he has likewise contracted to treat the passenger with due consideration, to protect him from personal rudeness and violence at the hands of others, and especially at the hands of himself, represented as he must be in the case of a carrier corporation by his agents and servants.[2] If he is injured by the miscon-

1 Long *v.* R. Co., 28 Pac. Rep. 977.

2 "Mistakes occur in such litigations by overlooking the fact that it is the carrier, whether corporation or natural person, that assumes these obligations, and not the driver, master or conductor of the conveyance, for the breach of which a right of action accrues to the passenger. * * * The moment the passenger enters the steamer or other conveyance he is more or less under the control of the master or conductor, and subject to their orders. Fit or unfit, humane or brutal, good-tempered or morose, the passenger is comparatively helpless, and may be obliged to submit for the time without any means of redress. * * * The cause of action arises from the breach of the obligation, and if so, it cannot make any difference whether the breach was occasioned by the act of the principal or of his employees." Mr. Justice Clifford, in

duct of the servant, the contract is broken, and it matters not whether his conduct was negligent, willful or malicious. The injury to the passenger is not an act of *commission* by a servant of the carrier, but an act of *omission*, viz., to fail to protect the passenger while in his charge; and it is nowhere denied that where a person is by law or contract bound to do something, he cannot excuse himself for a failure in this respect, on the ground that it was the fault of another employed by him.[1] Every servant of the carrier is bound to protect the passenger. For him to get out of the scope of his employment, he must dissolve entirely his relation to the carrier, and leave his employ. The specified duty of the particular servant in carrying out all other obligations may be very limited, but the scope of his employment is as broad as the obligations of his master.[2]

Pendleton *v.* Kinsley, 3 Cliff. 416. "Where was the corporation, and by whom represented, as to this contract and this passenger? Not, surely, in some foreign board-room, by directors making regulations and appointing agencies for the corporate business. They could not perform this contract. Not, surely, in some distant office, by a superintendent or manager issuing the orders of the directors to his subordinates. He could not perform this contract. *Quoad* this contract and this passenger, the corporation was present on this train, to keep it and to care for her, represented by the officers of the train, who possessed, *pro hac vice*, the whole power and authority, and were the living embodiment of the ideal entity which made the contract and was bound to keep it." Ryan, C. J., in Croaker *v.* R. Co., 36 Wis. 657. And see Brand *v.* R. Co., 8 Barb. 368; Landreaux *v.* Bell, 5 La. 434.

[1] The carrier, for example, is bound to furnish a secure road-bed so far as the highest degree of care can make it secure. He cannot plead the neglect of an independent contractor engaged to construct the road. See § 301: "It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another, and appoint an agent to furnish it, and the agent, of malice, furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases malice is negligence." Ryan, C. J., in Croaker *v.* R. Co., *post.*: In Weed *v.* Panama R. Co., 17 N. Y. 362; 72 Am. Dec. 475; the conductor willfully detained a train overnight in an unhealthy locality, exposing the passengers to great dangers and hardships. The railroad was held liable on the ground that the carrier was bound to carry the passengers with reasonable dispatch, and it was no answer to an action for the breach of this duty that they had committed its performance to an agent who had wantonly disregarded his duty.

[2] Lakin *v.* R. Co., 15 Pac. Rep. 641 (Oreg.).

1. The obligation of the carrier to carry the passenger safely includes the duty of preserving him from bodily harm. He is responsible, therefore, if the passenger is assaulted and beaten while in his charge, by the servants employed to carry out the agreement.[1] In the leading case in New York, a passenger on a street car expostulated with the driver for his treatment of a small boy who had tried to steal a ride on the car, whereupon the driver attacked him and cruelly beat him. The lower court had dismissed the complaint on the ground that the driver in assaulting the passenger was not acting in the course of his employment, but made the attack to gratify a wicked and malicious purpose of his own. In reversing the case and holding the carrier liable, the court said:[2] "Had the person assaulted been one to whom the defendant owed no duty, the dismissal of the plaintiff's complaint would probably have been correct; but the rule which applies in such a case, has no application as between a common carrier and his passenger. In such a case a different rule applies. By the defendant's contract with the plaintiff, it had undertaken to carry him safely, and to treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which a carrier owes to the passenger." In Massachusetts, a carrier by water was held liable under almost exactly the same circumstances.[3] In Kentucky the clerk of a boat, after hav-

1 Pendleton *v.* Kinsley, 3 Cliff. 416; Moore *v.* R. Co., 4 Gray, 465; Picketts *v.* R. Co., 10 South. Rep. 800 (W. Va.).; Houston etc. R. Co. *v.* Washington, 30 S. W. Rep. 719 (Tex.).

2 Stewart *v.* R. Co., 90 N. Y. 588; 43 Am. Rep. 185.

3 Bryant *v.* Rich, 106 Mass. 180; 8 Am. Rep. 311, the court saying: "In this case the servants who committed the wrong

ing collected the proper fare from a boy, charged him with having hidden under the boilers, and on the boy's denying, knocked him down, destroying one of his eyes. A verdict of $4,000 against the carrier was affirmed on appeal, the court saying: "As the compensation the carrier receives from the passenger is not only in consideration that he will transport him from one point to another, but of the further fact that during the time he is so transporting him, reasonable diligence will be used to protect him from insult and injury, it seems to us that it results necessarily that the contract must guarantee immunity from violence at the hands of those whose duty it is to afford this stipulated protection."[1]. In Maine, a brakeman, having been worsted in a difficulty with a passenger, after the quarrel had ended, came up from behind and inflicted several blows upon the passenger's head with an iron stove-poker. The court held that although the brakeman was obstructed in the performance of his duty in the first instance, yet the struggle having ended, the company was to be held responsible for the wanton act of its servant in renewing the strife.[2] In Illinois, a passen-

being the steward and table waiters, were those who were engaged in providing meals, waiting on the tables and collecting the pay for meals. They were treating the plaintiff's relative with gross rudeness in connection with this business, and the plaintiff interfered only by a remark that was proper, whereupon the assault was committed. It was not as if a quarrel had occurred on shore and disconnected with the duties of persons on shipboard. It violated the contract of the defendants, as to how the plaintiff should be treated by their servants, who were employed on board the ship and during the passage. For a violation of such a contract either by force or negligence, the plaintiff may bring an action of tort, or an action of contract."

[1] Sherley *v.* Billings, 8 Bush, 147.

[2] Hanson *v.* R. Co., 62 Me. 84; 16 Am. Rep. 404, the court saying: "It is the duty of the conductor, and other employees upon a train of cars, to treat the passengers with civility, and to abstain from all unnecessary violence toward them. It is also the duty of passengers to observe the rules and regulations of the company, and to conduct themselves generally so as not to invite uncivil treatment, nor provoke violence. But it is not true that disobedience to the rules of the company will operate as a license to the employees to maltreat a passenger. If a passenger persists in violating the reasonable rules of the company, after notice of the rules, and a request to him not to act contrary to them, the carrier will have a right to rescind the contract for his conveyance, and refuse to carry him further. But he

ger, having accused the brakeman of stealing his watch, the brakeman struck him in the face with a lantern. The court held the railroad liable for the assault, saying: "The contract which existed between appellant as a common carrier, and appellee as a passenger, was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train."[1] In Indiana, the carrier was declared liable for the act of a servant in maliciously throwing water on a passenger while he was standing at the door of the car;[2] in Georgia, for the act of a brakeman in calling a passenger out of the car at a way station and beating him;[3] in the Federal court for the act of

will have no right to maltreat him while continuing to perform the contract for his conveyance. Nor is it true that an uncivil word by a passenger at the beginning of his journey will justify the carrier's servants in treating him with insolence to the end of it. Nor is it true that an assault, or resistance to the performance of a duty, will justify the servant in pursuing and punishing the passenger, after the assault or the resistance is over. If he does, he makes the carrier as well as himself liable for the injury."

[1] Chicago etc. R. Co. *v.* Flexman, 103 Ill. 485; 42 Am. Rep. 29, the court also saying: "If, for example, a conductor or brakeman in the employ of a railroad company should willfully or maliciously assault a stranger, a person to whom the railroad company owed no obligation whatever, the master in such a case would not be liable for the act of the servant; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented—one which rests entirely upon a different principle."

[2] Terre Haute etc. R. Co. *v.* Jackson, 81 Ind. 19, the court saying: "It is immaterial whether the conductor or brakeman had been required or authorized to wash out the cars of the company for any purpose. The appellant had undertaken to carry the plaintiff, as a passenger, upon its train, and was bound to do it safely. For this purpose, the appellant was represented by its agents in charge of the train, and if they did anything inconsistent with the safe carriage and delivery of the plaintiff, at his destination, unharmed, the appellant, upon the plainest principles of law as well as good policy, is liable for the injury. The drenching of a passenger with water, either negligently or willfully, is a clear and direct breach of the duty to carry safely, and it is immaterial upon the question of the company's liability, whether it resulted from the fault of the brakeman alone, or of the conductor, or both of them. They were each agents of the company for the running of the train, and the company therefore is responsible for the acts of either, or both, in so far as such acts affected the passenger. It follows that if the conductor was faultless in raising the valve and in throwing the water into the caboose, which could hardly be when he knew there was a passenger there liable to be injured, and the brakeman designedly procured the plaintiff to go to the door of the caboose in order that the water might strike him, the company is clearly liable for the injury; that the evidence tends to show this state of facts is not disputed."

[3] Peeples *v.* R. Co., 60 Ga. 281.

a conductor in threatening a passenger with a revolver.[1] And in Wisconsin the railroad was held liable where a ticket agent left another employee in charge of the ticket office, who, being intoxicated, returned a passenger too small an amount of change, and being remonstrated with, assaulted him.[2]

2. It includes likewise, the duty of preserving him from rudeness and insult.[3]. In a Maine case, a passenger, having surrendered his ticket to a brakeman, was afterwards approached by him and accused of endeavoring to avoid the payment of his fare, in the most abusive language, which was supplemented by the most atrocious conduct. The plaintiff, a person in ill health, reclined in his seat, wholly unable to respond to the charge, or make any explanation; the servant, bringing his fist in close proximity to the plaintiff's face, shaking it violently, threatened to spill his brains on the spot if he opened his mouth. This exhibition

1 Gallena *v.* R. Co., 13 Fed. Rep. 116, Caldwell, J., saying: "The office of conductor of a passenger train is an exceedingly important and responsible one. There are few positions which demand of their incumbents more good judgment and self possession. Not only the peace and comfort, but the lives as well, of passengers are in their keeping. They must not, by any act of their own, disturb the one or endanger the other. They have to deal with all classes of people. They daily come in contact with the unscrupulous and dishonest, who are seeking to defraud the railroad company of what is justly its due, and are often grossly insulted by the ignorant and the vulgar for a lawful and proper discharge of their duties. It is obvious that if a conductor was to attempt to redress every personal insult, or enter a boisterous quarrel with every vulgar and rude person who might invite it, there would be no peace or safety for his passengers. He must decline all contests. He can take action only in those cases where the rights of the railroad company, or the peace or safety, of the passengers under his charge, or his own safety demand it. And then he can only act in the mode and manner heretofore indicated, accomplishing what he has a right to do in the given case with as little force, violence, and confusion as is practicable and reasonable under the circumstances."

2 Fick *v.* R. Co., 68 Wis. 469; 60 Am. Rep. 878.

3 Keene *v.* Lizardi, 5 La. 431; 25 Am. Dec. 197; 6 La. 315; 26 Am. Dec. 478; Nieto *v.* Clark, 1 Cliff. 145; Balt. etc. R. Co. *v.* Blocher, 27 Md. 277; McGinnis *v.* R. Co., 21 Mo. (App.) 416; Lafitte *v.* R. Co., 42 La. Ann. 106; Williams *v.* Car Co., 40 La. Ann. 88; South. Kas. R. Co. *v.* Rice, 16 Pac. Rep. 817 (Kas.); Palmari *v.* R. Co., 39 N. Y. (Supt.) 23; Atlanta etc. R. Co. *v.* Condor, 75 Ga. 51; Louisville etc. R. Co. *v.* Ballard, 85 Ky. 307; 7 Am. St. Rep. 600, a case of a female passenger towards whom the conduct of the servants was "indecorous." Chamberlain *v.* Chandler, 3 Mason, 242; 5 Fed. Cas. 2575.

was prolonged for the space of about a quarter of an hour, in the presence of several passengers of both sexes. The ticket was subsequently produced and identified by the conductor, to whom the brakeman had delivered it only a few moments before. At the trial, the defendants claimed that they were wholly irresponsible for their servant's conduct, on the ground that it was willful and malicious, and wholly unauthorized by them. But said Walton, J.: "The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he (the carrier) is under to his passenger, and the duty which he owes a stranger. It may be true, that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is

assaulted and insulted, through the negligence or willful misconduct of the carrier's servants, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust."[1]

In Massachusetts a conductor had made a like charge against a female passenger, arousing the attention of all the other passengers, and after calling her a liar, snatched her parasol from her hand saying that he would keep it as security for her fare. The railroad company asserted on the trial that as its conductor was never authorized to seize a passenger's property to enforce payment of fare, and could not be, it was not liable for his act, but the Supreme Court thought otherwise.[2] In Wisconsin, a conductor kissed a female passenger, and the court held the railroad liable, saying: "We are unwilling to waste time or patience[3] in discussing the conductor's violation of the appellant's contract with the respondent. Every woman has a right to assume that a passenger car is not a brothel and that when she travels in it she will meet nothing, see nothing, hear nothing to wound her delicacy or insult her womanhood. It is enough to say that the appellant's contract of careful carriage with the respondent was not kept, was tortiously violated by the officer appointed by the appellant to keep it. And so the appellant seems at the time to have regarded it.

[1] Goddard *v.* R. Co., 57 Me. 202; 2 Am. Rep. 39. See also Malecek *v.* R. Co., 57 Mo. 18.

[2] Ramsden *v.* R. Co., 104 Mass. 117; 6 Am. Rep. 200.

[3] Nevertheless the judgment of Ryan, C. J., contains a most learned and exhaustive discussion of the principles of law applicable to such cases, and must be regarded as a leading case on this subject. Croaker *v.* R. Co., 36 Wis. 657; 17 Am. Rep. 504.

It is very certain that it had a right to dismiss the conductor, as it did, promptly and most properly rescinding his contract of employment for violation of his duty. For that person violated his contract with the appellant by violating the appellant's contract with the respondent. He sinned in the course of his employment against the appellant and the respondent alike; in one and the same act broke his own contract with the appellant, and the appellant's with the respondent."

§ 299. **Rule of Absolute Liability and Reasons Therefor.**—The rule on the subject may, therefore, be shortly stated thus: A carrier of passengers undertakes absolutely to protect them against the misconduct of his servants engaged in executing the contract of carriage.[1] And as said by the Maine court, it would be a matter of profound regret if the law were otherwise. The carrier selects his own servants, and should be responsible for the manner in which they execute their trust. It is certainly, as important for the traveling public, that they should be trustworthy as that they should be competent.[2] Again, a different rule would be absurd, for it would make the carrier liable if a car porter should fail to keep guard over the passenger's effects, and allow a thief to steal them, while it would hold him not liable if the porter should turn pickpocket and rifle the pockets of the passengers;[3]

1 New Jersey Steam. Co. *v.* Brockett, 121 U. S. 637; Stewart *v.* R. Co., 90 N. Y. 588; 43 Am. Rep. 185; Koetter *v.* R. Co., 36 N. Y. (Supp.) 611; Dillingham *v.* Anthony, 73 Tex. 47; Conger *v.* R. Co., 45 Minn. 207; Gillingham *v.* R. Co., 14 S. E. Rep. 243 (W. Va.); Winnegar *v.* R. Co., 4 S. W. Rep. 237 (Ky.); Wabash R. Co. *v.* Savage, 9 N. E. Rep. 86 (Ind.); McGinniss *v.* R. Co., 21 Mo. (App.) 399; Lafitte *v.* R. Co., 42 La. Ann. 160; Savannah etc. R. Co. *v.* Bryan, 12 S. E. Rep. 307 (Ga.), and the other cases cited, *ante*.

2 Goddard *v.* R. Co., *supra*.

3 Stewart *v.* R. Co., *supra*. The argument that the carrier is liable for a servant negligently failing to protect the passenger against danger or injury from others but is not liable for the agent's malicious act is likened by Chief Justice Ryan to a contention that if a man hire out his dog to guard sheep against wolves, and the dog sleeps while a wolf makes away with a sheep the owner is liable, but if the dog play wolf and devour the sheep himself the owner is not liable. Croaker *v.* R. Co., *supra*.

would make the carrier liable if a stage driver, driving unskillfully, upset the coach and broke the passenger's leg; but allow him to go scot free if the driver, taking advantage of his position, assaulted or robbed the passenger.[1]

In a leading case in the Federal Courts[2] Mr. Justice Clifford says: "The obligation which the carrier assumes extends beyond the specified requirements in respect to the vehicle, car, or other means of conveyance, and also includes an implied stipulation for good treatment of the passenger during the passage, trip, or voyage, and especially against ill-treatment by the carrier or his employees, and against every degree of violence on their part, or wanton interference with his person. * * * Breaches of the obligation assumed by the carrier for proper treatment of his passengers, it is conceded, would give a right of action to the passenger if the acts constituting the breach were committed by the carrier himself; but the argument is that the carrier is not responsible for any willful trespass committed by the driver, conductor, or master, unless it be shown either that he authorized the act or ratified it after it was committed. * * * But the court is of the opinion that the principles of law applicable in litigations growing out of the relations of principal and agent or master and servant are not the principles which fully define the rights, duties, obligations, and

[1] Stewart *v.* R. Co., *supra*. In Wood, Master & Servant 648, it is said: If a carrier of goods for hire should commit the carriage of the goods to a servant, and the servant should steal them, or wantonly destroy them, or through his negligence injure, or suffer them to be injured, there is no question but that the master would be liable therefor, and it would be a singular rule, and an absurd one, that did not hold the carrier of passengers, intrusted not only with their comfort, but the safety of their persons, and their lives, during the journey, to as strict performance of this duty as of the other, and it will be seen by an examination of the cases that they are. They are bound to look out for the comfort of their passengers, and, as far as possible, save them from annoyance.

[2] Pendleton *v.* Kinsley, 3 Cliff. 416.

liabilities of the parties to this controversy. They are not strangers bearing no other relations to each other than one citizen, merely as such, bears to another; but the defendant was a carrier of passengers by water, and the plaintiff was a passenger on board the steamer of the defendant, which was engaged in carrying passengers for hire between two commercial ports. * * * Passengers do not contract merely for shiproom and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance, and for the fulfillment of those obligations the carrier is responsible as principal; and the injured party, in case the obligation of good treatment is broken, whether by the principal or his employees, may proceed against the carrier as the party bound to make compensation for the breach of the obligation."

§ 300. **Relation of Master and Servant Must Exist.** —The rule stated in the last section does not apply where the carrier does not stand in the relation of master to the servant by whose act the injury was occasioned.[1] As to the test as to whether a particular person is a servant of the other, it may be stated thus: Had he a right to control his conduct and direct his acts or did he do so?[2] which is a question of fact for the jury.[3] Thus, a carrier by water is not responsible

1 Patt. Ry. Acc. L. 101.

2 Laws. Right., Rem. & Pr. § 294; Brackett *v.* Lubke, 4 Allen 138; 81 Am. Dec. 694; Kimball *v.* Cushman, 103 Mass. 194; 4 Am. Rep. 528; Wood *v.* Cobb, 13 Allen 58; Sproul *v.* Hemmingway, 14 Pick. 1; Corbin *v.* Am. Mills, 27 Conn. 274; 71 Am. Dec. 63; Pawlet *v.* R. Co., 28 Vt. 297; Michael *v.* Stanton, 3 Hun. 462; Blackwell *v.* Wiswall, 24 Barb. 355; Blake *v.* Feris, 5 N. Y. 48; 55 Am. Dec. 304; Little *v.* Hacket, 116 U. S. 366; Lakin *v.* R. Co., 15 Oregon 220; Conger *v.* R. Co., 45 Minn. 207; Fluker *v.* R. Co., 81 Ga. 401; McGuire *v.* Grant, 25 N. J. (L.) 357; 67 Am. Dec. 49.

3 Penn. R. Co. *v.* Spicker, 105 Pa. St. 142.

for the neglect of a surgeon whom he is required to carry on his vessel, but does not control,[1] nor is a railroad responsible for the act of a government postal clerk, which the government sends with its mail on the train.[2]

The carrier would not be responsible for the wrong or negligent advice given to a passenger by another passenger, to get off a car while it was in motion, or at a place where it was dangerous to alight;[3] or for the negligence of one passenger in assisting another to alight.[4] Where the passenger can show nothing more than that he was assaulted by some one, but he knows not by whom, as he was entering the car, this will not make a case against the carrier.[5]

1 In O'Brien *v.* Cunard S. S. Co., 28 N. E. Rep. 266 (Mass.) 266, a carrier by water was held not liable for the negligence of a surgeon which by statute steamships are required to provide. Said the Court: "Under this statute it is the duty of the ship owners to provide a competent surgeon, whom the passengers may employ, if they choose, in the business of healing their wounds and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. They may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, or may go without treatment if they prefer, and, if they employ the surgeon, they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation or take the risk of going without it. The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business, and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statute of the United States applicable to such cases; and if, by the nature of their undertaking to transport passengers by sea, they are under a liability at the common law to make provision for their passengers in this respect that liability is no greater."

2 Mister *v.* R. Co., 61 Wis. 325; 50 Am. Rep. 141.

3 Ohio etc. R. Co. *v.* Stratton, 78 Ill. 88; Frost *v.* R. Co., 10 Allen 387; 87 Am. Dec. 668; Cinn. etc. R. Co. *v.* Farrell, 31 Ind. 408; Filer *v.* R. Co., 59 N. Y. 351.

4 Morrison *v.* R. Co., 56 N. Y. 303; Burrows *v.* R. Co., 63 N. Y. 556.

5 Sachrowitz *v.* R. Co., 37 Kas. 212. Unless he also shows negligence in the carrier's servant in protecting him from such assault, as to which see *post* § 302.

If the servants of the carrier permit a third person to perform the duties vested in them, the carrier will be liable for his act.[1] And if a passenger, aided and abetted by the conductor, uses excessive force in removing another passenger from the train, the carrier is liable for the resulting injuries.[2]

§ 301. **Liability for Acts of Independent Contractors.**—Where A employs B to do work for him according to his, B's methods, and not subject to A's control or orders, B is called an "independent contractor," and not a servant or agent, and A is not responsible for the negligent acts of B or his servants in the course of the work.[3] And A, having selected his contractor, is not bound to see that he is doing his work properly, but has a right to rely on his carrying out his agreement with prudence and care.[4] As in the course of construction and operation, a railroad is frequently obliged to engage independent contractors to perform work of this character, this principle has to be applied

1 Larkin *v.* R. Co., 15 Oreg. 641. But see Jewett *v.* R. Co., 55 N. H. 84.

2 Int. etc. R. Co. *v.* Miller, 28 S. W. Rep. 273 (Tex.).

3 Mayor *v.* McCary, 84 Ala. 469; Boswell *v.* Laird, 8 Cal. 469; 68 Am. Dec. 345; Bennett *v.* Truebody, 66 Cal. 509; 56 Am. Rep. 117; Scanmon *v.* Chicago, 25 Ill. 424; 79 Am. Dec. 334; Kellogg *v.* Payne, 21 Ia. 575; Kansas etc. R. Co. *v.* Fitzsimmons, 18 Kas. 34; Robinson *v.* Webb, 11 Bush. 264; Eaton *v.* R. Co., 59 Me. 520; 8 Am. Rep. 430; Ames *v.* Jordan, 71 Me. 540; 36 Am. Rep. 352; McCarthy *v.* Portland, 71 Me. 318; 36 Am. Rep. 320; Hilliard *v.* Richardson, 3 Gray, 349; 63 Am. Dec. 743; Detroit *v.* Corey, 9 Mich. 165; 80 Am. Dec. 78; Joslin *v.* Grand Rapids Co., 50 Mich. 516; 45 Am. Rep. 54; Moore *v.* Sanborne, 2 Mich. 519; 59 Am. Dec. 209; New Orleans etc. R. Co. *v.* Reese, 61 Miss. 581; Clark *v.* R. Co., 36 Mo. 202; Fink *v.* Furnace Co., 82 Mo. 276; 52 Am. Rep. 376; Wright *v.* Holbrook, 52 N. H. 120; 13 Am. Rep. 22; Carter *v.* Berlin Mills, 58 N. H. 52; 42 Am. Rep. 572; Cuff *v.* R. Co., 35 N. J. (L.) 17; 10 Am. Rep. 205; McGuire *v.* Grant, 25 N. J. (L.) 356; 67 Am. Dec. 50; Ewan *v.* Lippincott, 47 N. J. (L.) 192; 54 Am. Rep. 148; Blake *v.* Ferris, 5 N. Y. 48; 55 Am. Dec. 304; McCafferty *v.* R. Co., 61 N. Y. 178; 19 Am. Rep. 267; King *v.* R. Co., 66 N. Y. 182; 23 Am. Rep. 211; Ferguson *v.* Hubbell, 97 N. Y. 407; 49 Am. Rep. 544; Devlin *v.* Smith, 89 N. Y. 470; 42 Am. Rep. 311; Clark *v.* Fry, 8 Ohio St. 358; 72 Am. Dec. 590; Erie *v.* Caulkins, 85 Pa. St. 247; Harrison *v.* Collins, 86 Pa. St. 153; 27 Am. Rep. 697; Lancaster etc. Co. *v.* Rhoads, 116 Pa. St. 377; 2 Am. St. Rep. 608; Smith *v.* Simmons, 103 Pa. St. 32; 49 Am. Rep. 113; Paulet *v.* R. Co., 28 Vt. 297. So in England: Laugher *v.* Pointer, 5 B. & C. 547; Quarman *v.* Bennett, 6 M. & W. 499.

4 Daniels *v.* R. Co., 6 App. Cas. 740.

in actions against the carrier for the negligence of such third parties. In a Texas case, the railroad company had let a contract to a firm to construct a portion of its road, and before the work was completed and turned over to it, a construction train, carrying a passenger without the knowledge or consent of the railroad (the management of the train being in the contractor and his servants' alone), was derailed and the passenger injured. It was held that the railroad was not liable, the court saying that "to hold otherwise would virtually forbid parties to construct works of improvement, or perform many other acts, except by their own servants, unless at great peril for liability for the actions of others over whom they have no immediate control."[1]

The master *will* be liable, however:

1. *Where he has reserved to himself the supervision and control of the work*—for here the contractor is clearly not "independent."[2] Therefore, in another Texas case where a passenger riding on a construction train was killed, but it appeared that the conductor and engineer were employed and paid by the railroad company which alone had the power to appoint and discharge them, though it was usual for it to discharge them on the contractor's complaint, it was held that the railroad was liable.[3] It is said that the fact that the master

[1] Cunningham *v.* R. Co., 51 Tex. 503; 32 Am. Rep. 633; see also Bailey *v.* R. Co., 57 Vt. 252; 52 Am. Rep. 129; West *v.* R. Co., 63 Ill. 545; Kansas etc. R. Co. *v.* Fitzsimmons, 51 Tex. 503; Union Pac. R. Co. *v.* Hause, 1 Wym. 27; Miller *v.* R. Co., 39 N. W. Rep. 188 (Ia.); Callahan *v.* R. Co., 23 Ia. 562; Clark *v.* R. Co., 36 Mo. 202; Meyer *v.* R. Co., 2 Neb. 319; Central R. Co. *v.* Grant, 46 Ga. 416.

[2] Speed *v.* R. Co., 71 Mo. 303; Burmeister *v.* R. Co., 47 N. Y. (S. C.) 264; Linnehan *v.* Rollins, 137 Mass. 123; 50 Am. Rep. 287; Wilson *v.* White, 71 Ga. 506; 51 Am. Rep. 269; Brackett *v.* Lubke, 4 Allen 138; 81 Am. Dec. 694; Faren *v.* Sellers, 39 La. Ann. 1011; 4 Am. St. Rep. 256; Griffiths *v.* Wolfram, 22 Minn. 185; Gilbert *v.* Beach, 16 N. Y. 608; Cincinnati *v.* Stone, 5 Ohio St. 38; St. Paul *v.* Seitz, 3 Minn. 297.

[3] Burton *v.* R. Co., 61 Tex. 526, the Court saying: "If for his own protection, the owner reserves, over that which he permits to be used by another, the essential powers of a master, it is but just

reserves simply a limited control over the contractor, will not render him liable for the negligence of the contractor or his servants;[1] but what is a control and what only a "limited" control must, we submit, be rather a close and difficult question to decide.

2. *Where the contractor was employed to do the act which causes the injury.* In an English case,[2] a railroad, being authorized to construct a draw bridge over a navigable river, employed a contractor to build it, but the bridge was so negligently constructed that when it was completed it could not be opened, and the plaintiff's vessel was prevented from passing through. It was held that the railroad was liable. Said Pollock, C. B.: "Where the act complained of is purely

that he should be held to sustain that relationship when the rights of others, affected by the negligence of those so selected, paid and kept in his employment, are brought in question. If a locomotive or train had been injured or destroyed through the negligence of those engaged in operating them, what case would the railway company have against the contractors under either of the states of fact which, from the evidence as it was developed, may be inferred to have existed? The reply of the contractors to an action for damages based on such facts would be: 'Locomotives and trains were operated by men of your own selection, paid by you, and over whom you gave to us no power to discharge. You retained over those operating them the powers and rights which the master has over his servants, and you must bear the burdens which result from their failure of duty to you.' Such a defense would be unanswerable. If, for an injury resulting as did that under consideration, an action should be brought by the injured person, or by his representatives in case of his death, against the contractors, what would be their reply? It would certainly be: 'We were not the masters of those persons who operated the trains; they were selected and employed and paid by the railway company, and we had no power to discharge them. We could direct them what to transport, to what place, and when, but how it should be done, in so far as running the train was concerned, we had no power to control; in reference to that matter, the railway company, for the protection of its own property, operated it by its own servants, and as it does not appear that the injury resulted from any negligence of ourselves or our servants, we are not liable.' Such an answer would be hard to meet."

[1] Thomp. Neg. 913 § 41; Patt. Ry. Acc. L. 125. For cases illustrating this distinction see Clark *v.* R. Co., 36 Mo. 202; Callahan *v.* R. Co., 23 Ia. 562; Nevins *v.* Peoria, 41 Ill. 502; 89 Am. Dec. 392; Robinson *v.* Webb, 11 Bush. 464; Erie *v.* Caulkins, 85 Pa. St. 247; Harrison *v.* Collins, 86 Pa. St. 153; Samuelson *v.* Mining Co., 49 Mich. 464; 43 Am. Rep. 456; Hunt *v.* R. Co., 51 Pa. St. 475; Hughes *v.* R. Co., 39 Ohio St. 461; Hexamer *v.* Webb, 101 N. Y. 377; Burmeister *v.* R. Co., 47 N. Y. (s. c.) 264; *contra*, Harper *v.* Milwaukee, 30 Wis. 365; Schwartz *v.* Gilmore, 45 Ill. 455; 92 Am. Dec. 237; Camp *v.* Churchwardens, 7 La. Ann. 321; Slater *v.* Meseran, 64 N. Y. 138.

[2] Hole *v.* R. Co., 6 H. & N. 488.

collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized the act—the remedy is against the person who did it. But when the contractor is employed to do a particular act, the doing of which causes mischief, another doctrine applies."[1] A simple illustration of this distinction will suffice. A employs B, an independent contractor, to build a house. During the progress of the work, B's workman negligently drops a beam on the head of C, a passer by. When the house is completed it is so negligently constructed that it falls down and injures D. Here A is liable to D, although not to C, for the injury.

3. *Where the work contracted for is wrongful or dangerous, per se.* If the master lets out a work to be done which must result in a nuisance, he is liable for the nuisance.[2] So, where the doing of the work is a trespass on the rights of others.[3] So, where the work which the contractor is engaged to do is likely to do injury, the master must take precautions to guard against such probable mischief, or he will be responsible.[4] Thus, A employs B, an independent contractor, to build a house, the plans requiring an excavation in the street. A traveler falls into the hole. A must respond in damages, as he should have seen to it that the excavation was properly guarded.[5] On this principle, where a contractor was employed by a carrier to construct an embankment at the side of a railroad

1 And see Bower *v.* Peate, L. R. 1 Q. B. 321; Brown *v.* Werner, 40 Md. 15; Carmen *v.* Steubenville, 4 Ohio St. 399.

2 Carmen *v.* Steubenville, 4 Ohio St. 399; Lowell *v.* R. Co., 23 Pick. 24; 34 Am. Dec. 33; City of Tiffin *v.* McCormack, 34 Ohio St. 638; 32 Am. Rep. 408; Creed *v.* Hartman, 29 N. Y. 591; 86 Am. Dec. 341; Keegan *v.* R. Co., 8 N. Y. 175; 59 Am. Dec. 476; Cuff *v.* R. Co., 35 N. J. (L.) 17; 10 Am. Rep. 205.

3 Leber *v.* R. Co., 29 Minn. 256.

4 Bower *v.* Peate, 1 Q. B. Div. 321; Brown *v.* Werner, 40 Md. 15; Virginia etc. R. Co. *v.* Sanger, 15 Gratt. 230.

5 Robbins *v.* Chicago, 5 Wall. 657; Chicago *v.* Robbins, 2 Black, 418.

track, and a stone fell on the track and derailed the train, injuring a passenger, it was held that the railroad should have guarded against such an accident, and must pay damages.[1]

4. *Where the duty is imposed by contract or law.* Where a person has contracted to do something, he cannot excuse himself by showing that the agreement has been violated by an independent contractor, and not by himself.[2] A company agreed to lay water pipes in a city, agreeing with the city that it would protect all persons against damages on account of the excavations to be made, and then let out the work to a contractor who, in the negligent use of a steam drill, injured a traveler. The company was held liable to the traveler.[3]. And the rule is the same where the duty is prescribed by law, independent of contract.[4] Thus, where a municipal ordinance requires the owner of any building material placed in a street to protect it at night with lights, he is liable to a person who is injured through the failure to do so, even though it arose through the fault of his contractor.[5] It is on this ground that a carrier can not escape liability for an injury to a passenger caused by defects in its means of transportation, though they are the work of independent contractors. A well known English case—*Francis* v. *Cockrell*,[6] contains an interesting and instructive application of this principle. The defendant acting on behalf of himself and a number of others interested in certain races on a race course, contracted

1 Virginia etc. R. Co. *v.* Sanger, *supra.*

2 Sulsbacker *v.* Dickie, 6 Daly, 469; Campbell *v.* Somerville, 114 Mass. 334.

3 Water Co. *v.* Ware, 16 Wall. 566; a *contrary* ruling in Blake *v.* Ferris, 5 N. Y. 48, is criticised in Storrs *v.* Utica, 17 N. Y. 106 and in Thomp. Neg. 906 § 28.

4 Lowell *v.* R. Co., 23 Pick. 24; 34 Am. Dec. 33; Grey *v.* Pullen, 5 B. & S. 970.

5 Wilson *v.* White, 71 Ga. 506; 51 Am. Rep. 269.

6 L. R. 5. Q. B., 184, 501.

with a firm of builders to construct a grand stand for the purpose of viewing the races. To this stand spectators were admitted on paying a small sum, the money being appropriated to the racing fund. The plaintiff having paid his admission, was seated on the stand when it broke down and injured him. The stand having been negligently constructed, it was held that the defendant was liable, although he did not know of the defect, was guilty of no negligence himself and had employed competent persons to erect it. "The defendant" said Hannen, J., "acting on behalf of himself and several other persons interested in the Cheltenham steeplechases, entered into a contract with Messrs. Eassie by which they engaged to erect and let to the defendant and the other persons a temporary stand for the accommodation of persons desiring to see the races. The stand having been erected, the defendant, on behalf of himself and his colleagues, received money from visitors for the use of places on the stand. Messrs. Eassie were competent and proper persons to be employed to erect the stand, but it was in fact negligently erected by them; and in consequence of its being so negligently erected it fell, and the plaintiff, who had paid for admission, and was upon the stand looking at the races, was injured by the fall. Neither the plaintiff nor the defendant knew of the improper construction of the stand. We think it clear that the defendant, by receiving money from the plaintiff as the price of his admission to the stand, entered into some engagement with him with reference to its condition; but, in order to determine whether the defendant is liable in damages for the injury which the plaintiff sustained, we have to consider what the extent of that engagement was. The nearest analogy to this case seems

to be afforded by that of carriers of passengers. The carrier is paid for providing the means of transporting the passenger from place to place. The defendant received payment for providing the means of supporting the spectator at a particular place. This distinction does not appear to give rise to any difference in principle between the contract to be implied in the one case and the other, as to the safety of the means provided for carriage or support. The recent decision of the Exchequer Chamber affirming the judgment of this Court in *Readhead* v. *Midland Railway Company*,[1] has established that there is not in such a case any implied warranty that the carriage provided is in all respects fit for its purpose; but that decision, while it gives confirmation (if any were needed) to the proposition that the carrier undertakes that he has used due care in providing safe means for the conveyance of the passenger, expressly leaves undetermined the further question whether the carrier also undertakes that due care has been used by those who have contracted with him to provide the means of conveyance. In the present case it is not found that the defendant was himself wanting in due care, and no power to draw inferences of fact is given to the Court; and if it were, we should not be able to draw the inference that the defendant was personally guilty of any want of care. He employed competent and proper persons who had efficiently executed similar work on previous occasions. The circumstance that the defendant did not himself survey or employ any one to survey the stand after it was erected, does not in itself establish the charge of negligence; for it does not appear that the defect was such as could have been discovered on inspection; and

[1] *Ante*, p —.

even if it had been, it cannot be laid down as necessarily a want of care not to inspect, although it would in some circumstances be evidence from which a jury might properly find that due care had not been taken.

"It becomes necessary, therefore, for us to consider whether the contract by the defendant to be implied from the relation which existed between him and the plaintiff was that due care had been used, not only by the defendant and his servants, but by the persons whom he employed as independent contractors to erect the stand. It is said in the judgment of the Court of Exchequer Chamber in *Readhead* v. *Midland Railway Company*, 'warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given.' Applying this rule to the present case, we think that the contract by the defendant with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work, as well as by himself. In the ordinary course of things the passenger does not know whether the carrier has himself manufactured the means of carriage or contracted with some one else for its manufacture. If the carrier has contracted with some one else the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge and over which he can have no control; while the carrier can introduce what stipulations and take what securi-

ties he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier. Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way in which effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected and whose breach of contract has caused the mischief. We have already stated that we consider the same reasoning which is applicable to the case of a carrier of passengers is applicable to the case of a person who, like the plaintiff, provides places for spectators at races or other exhibitions. But not only do we think that when the reasons of justice and convenience on the one side and on the other are weighed, the balance inclines in favour of the plaintiff, but we are also of opinion that the weight of authority is on the plaintiff's side." Kelly, C. B., said in the same case, "I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied. That I hold to be a general proposition of law applicable to all contracts of this nature and character. It is, indeed, subject to

a qualification or exception, as determined by the case of *Readhead* v. *Midland Railway Company;* but that qualification extends only to the case of some defect which is unseen and unknown and undiscoverable, not only unknown to the contracting party, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination. * * * Whether it be the case of a carriage or of a bridge, or as in the present case of a stand in which seats are contracted for to witness some public spectacle, the rule of law and the rule of reason and good sense appear to me to be the same. Take the more ordinary case of a carriage. If a man engaged in consideration of, say, a guinea, to supply a carriage such as an omnibus, to hold six persons, to proceed on an excursion to the Crystal Palace, and a guinea is paid, and the carriage is sent, is it possible to conceive that he does not contract, not only that the carriage shall contain seats for six persons, but that it shall be reasonably fit for the purpose? * * * First, there is the principle, which I hold to be well established by all the authorities, that one who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeplechase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant, and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied; but secondly, he does not contract against any unseen and unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination. * * * I am therefore,

of opinion that there was a contract between the plaintiff and the defendant—an implied contract indeed, but yet a binding contract—and that that contract did, in effect, extend to this, that the stand, upon which the defendant had engaged that the plaintiff should enjoy a seat in consideration of 5 s. during the steeplechase, was reasonably fit for the purpose for which it was to be used, and for which the seat was contracted to be supplied to the plaintiff. It was not so fit, and the defect was no unseen and unknown and undiscoverable defect, but it was a defect occasioned by the negligence and want of care and skill of those with whom the defendant had contracted for the erection of the stand." And Montague Smith, J., added: "I think, in conformity with the decision in *Readhead* v. *Midland Railway Company*, that there was no warranty or insurance that the stand was absolutely safe; but, I think, that there was an implied undertaking on the part of the defendant that due care had been used in the construction of it. It seems to me that, in cases of this kind which relate to things and not to personal services, the undertaking or promise to use due care may be more correctly stated in an impersonal than a personal form, and the proper mode of stating it is, the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form, that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so. It seems to me that those are obligations which are to be implied from a contract of this kind, and that in this case they have been broken; for, although it is not found that there was any personal negligence on the part of the defendant, yet it is found that there was

negligence on the part of those who constructed the stand, and who were employed by the defendant to erect it. For that negligence it seems to me that the defendant is responsible." The carrier, therefore, cannot evade this duty by attempting to transfer it to another.

§ 302. **Must Protect Passengers Against Fellow Passengers and Strangers.**—The carrier also impliedly contracts to protect the passenger against insult and corporal injury at the hands of third persons, whether fellow passengers or strangers.[1] He is not an insurer in this case,[2] but it is a question of diligence and care in the emergency which requires their exercise.[3]

As to riots on the train, or mobs at stopping places, he is under no obligation to furnish a standing police-force sufficient for the emergencies of occasions of extraordinary danger to passengers, which could not have been foreseen. But it is his duty to exhaust every means in his power to further the safety of passengers; to call together all the servants of the company, and such passengers as are willing to lend a helping hand, and make a determined effort to quell a disturbance which threatens the safety of passengers

1 Pittsburg etc. R. Co. *v.* Hinds, 53 Pa. St. 512; 91 Am. Dec. 224; Putnam *v.* R. Co., 55 N. Y. 108; 14 Am. Rep. 190; Flint *v.* Norwich etc. Trans. Co., 34 Conn. 554; 6 Blatchf. 158; Pittsburg etc. R. Co. *v.* Pillow, 76 Pa. St. 510; 18 Am. Rep. 424; New Orleans etc. R. Co. *v.* Burke, 53 Miss. 200; 24 Am. Rep. 689; Flannery *v.* R. Co., 4 Mackey, 111; Railway Co. *v.* Vallely, 32 Ohio St. 345; 30 Am. Rep. 601; Holly *v.* R. Co., 61 Ga. 215; 34 Am. Rep. 97; Britton *v.* R. Co., 88 N. C. 536; 43 Am. Rep. 749; Murphy *v.* R. Co., 23 Fed. Rep. 637; Hendricks *v.* R. Co., 12 Jones & S.; 8 Sherley *v.* Billings, 8 Bush, 147; 8 Am. Rep. 451; Goddard *v.* R. Co., 57 Me. 202; 2 Am. Rep. 39.

2 "When passengers purchase their tickets and take their seats, they know that the train is furnished with the proper hands for the conduct of the train, but not with a police force sufficient to quell mobs by the wayside. No such element enters into the implied contract. It is one of the incidental risks which all who travel must take upon themselves." Pitts. etc. R. Co. *v.* Hinds, 53 Pa. St. 512; 91 Am. Dec. 224.

3 And whether the carrier and his servants have done their duty in this respect is a question for the jury. Holly *v.* R. Co., 61 Ga. 215; 24 Am. Rep. 97.

in general.[1] In a leading case, the court left it to the jury to say—a passenger on a boat having been injured during a scuffle among a lot of drunken soldiers—whether the carrier's servants had been vigilant in attempting to quell the disorder, and in notifying the other passengers of the condition of the men and the danger of coming in contact with them.[2] In one case the carrier was held to be guilty of negligence in stopping the train in the midst of a howling mob, to take on persons whom the mob were seeking an opportunity to maltreat.[3] In another, the master of a ship was held responsible for losses incurred by a passenger at the hands of a pair of gamblers and tricksters, which it was in his power to have prevented, because he was aware of the character of one of the swindlers.[4]

As to assaults by one individual on another, if the action of the person making the assault should have shown the carrier's servants that he was dangerous to passengers, they should restrain or remove him, but if his conduct has not been such that his action might reasonably have been anticipated, the carrier will not be liable.[5]

Where the passenger is injured by the *negligence* of a third person, the question is the same, viz.: Did the carrier omit to use the proper degree of care to prevent

1 Pitts. etc. R. Co. *v.* Hinds, *supra*.

2 Flint *v.* Norwich etc. Trans. Co., *supra*.

3 Chicago etc. R. Co. *v.* Pillsbury, 123 Ill. 9; 5 Am St. Rep. 483.

4 Smith *v.* Wilson, 31 How. Pr. 272.

5 Putnam *v.* R. Co., 55 N. Y. 108; 14 Am. Rep. 190. In this case one Foster, an intoxicated passenger, having insulted two women with A in a street car, was ordered by the conductor to take a seat and be quiet, which he did. After the conductor returned to the rear platform of the car, F resumed his abuse, and threatened A but in a tone not sufficiently loud for the conductor to hear. F then went upon the front platform, and remained there quietly until A left the car and was assisting his companions to alight, when F came round from the front platform and assaulted him with a car-hook, inflicting blows upon his head from the effects of which he died. The murderer was tried and hanged, but the carrier was held not liable in damages. So in Patton *v.* R. Co., 77 Ala. 591; 54 Am. Rep. 80, where a female was grossly insulted without the knowledge or anticipation of the carrier's servants. King *v.* R. Co., 22 Fed. Rep. 413; Louisville etc. R. Co. *v.* McEwan, 31 S. W. Rep. 465 (Ky.).

the injury? In a New York case, a passenger had placed a clothes wringer wrapped in brown paper, in the rack over the seats, and during the journey it fell on the head of a fellow passenger injuring him. The carrier was held not liable, because "it was clear that there was nothing extraordinary about the parcel or its position in the rack, and nothing to attract particular attention to it; and so the failure of the train hands to notice it, or if noticed, to order its removal, was not negligence."[1] But in a Texas case, where the plaintiff testified that in alighting from a car she was forced against the railing of the car, and pushed from the steps and injured by two men who were quarreling on the platform, and it was shown to be defendant's usual custom to have some one standing at the foot of the steps to assist passengers to alight, but that no one was there when plaintiff alighted, this fact was held sufficient to charge the carrier.[2] And though a government postal clerk is not a servant of the railroad, yet it is liable for the act of the clerk in throwing a bag from a passing train which strikes a passenger standing on the platform, it having allowed this to be done before, and taken no precaution to protect passengers from the results.[3]

If, in the course of the assault upon the passenger he should be robbed of portions of his clothing or usual and reasonable articles of personal ornament, his watch or his purse, with the money for his traveling and other personal expenses, the carrier would be liable for the loss thus sustained. But he would not be

[1] Morris *v.* R. Co., 106 N. Y. 678; Gulf etc. R. Co. *v.* Shields, 28 S. W. Rep. 709 (Tex.).

[2] Missouri etc. R. Co. *v.* Russell, 28 S. W. Rep. 1042 (Tex.).

[3] Snow *v.* R. Co., 136 Mass. 552; 49 Am. Rep. 40; Carpenter *v.* R. Co., 97 N. Y. 494, 49 Am. Rep. 540; and see Hughes *v.* R. Co., 30 S. W. Rep. 127 (Mo.). In a similar case in Wisconsin, the railroad was properly held not responsible there being no evidence that the bag had been thrown off before. Muster *v.* R. Co., 61 Wis. 325; 50 Am. Rep. 141.

liable for any large sum of money he might be carrying on his person, which was not "baggage," and of which the carrier had no notice.

In a New York case[1] the plaintiff was a passenger on a railroad train. On its arrival in New York city, the cars were disconnected and drawn by horses, and the car in which plaintiff was riding was left standing alone, with no employee of the defendant in charge of it. Three men entered the car, and forcibly took from his person, and carried away, a package of United States bonds of the value of $16,000. But it was held that the carrier was not liable for the money. Said the Court: "The plaintiff seeks to base the right to recover of the defendant upon the ground that it was bound to protect the passengers in its cars from open invasion, and forcible assault, injury and robbery. We do not need to deny this proposition here. A carrier of passengers is bound to exercise the utmost vigilance in maintaining order and guarding his passengers against violence. But if he neglects to do so, for what is he liable? His liability arises upon contract, expressly made or implied from his duty; or from the duty of his employment, public in its nature. It is plain that the plaintiff and defendant here made no express contract in relation to these securities. Whatever contract the sale and purchase of a passenger ticket expresses, it does not make a contract which was not in the mind of both parties, or imputable to them by law. We have shown that the law does not impute a contract to carry for a passenger other goods than ordinary baggage; and as the defendant had no knowledge or notice of these securities, it could not have had intention to engage for the carriage and delivery of them.

[1] Weeks *v.* R. Co., 72 N. Y. 50; 28 Am. Rep. 104.

If the plaintiff is to recover, it must be *ex delicto*, upon the duty of defendant. A public carrier of goods is bound to vigilance, and may set up as an excuse for want of safe carriage and sure delivery nothing but an exempting act of the shipper, an act of God, or of the public enemy. Yet if the shipper conceal from the carrier, or fail to notify him, that in a package of mean appearance is placed an article of great value, the ordinary negligence of the carrier may sustain a judgment for what a passenger usually carries, but will not warrant a recovery by the shipper of the worth of his property of great price.[1] The carrier of goods, in the absence of express agreement, is liable by reason of his negligence, for damages to such amount as would ordinarily be expected to result therefrom. So, though a carrier of passengers is bound to guard one going in his vehicle from violence, the damages he must pay, if he neglects his duty, are such as would ordinarily result therefrom, as would naturally be contemplated by the parties on making their contract, or assuming their relative rights and obligations. Such a carrier is bound to take the passenger, and to carry together with him his luggage, reasonable in size and weight, and in kind and value of the articles filling it, such as is naturally and usually required by a passenger, and reasonable for his personal use while on the way or at his place of destination. Should that luggage be lost by the carrier, or misdelivered, or stolen from him, though it may contain large sums of money or articles of great value, or things not destined for personal use, the carrier is not however liable for them, but for so much of the contents as falls within the classification we have given

[1] Miles *v.* Cattle, 6 Bing. 743.

above. In the same way (though we do not pass authoritatively upon it), should a passenger be assailed in the vehicle of the carrier in such circumstances as that it was a breach of the duty of the latter, that failed to protect the former from violence, and should he be robbed of portions of his clothing, or usual and reasonable articles of personal ornament, his watch, or his purse with the money for his travelling and other personal expenses, it may be that the carrier would be liable for the loss which its passenger had sustained. But if the passenger had seen fit privately to place and carry upon his person securities or articles of great value not falling within the above category, without the knowledge of, or notice to the carrier, and in the melee they should be lost or stolen, the latter is not liable for them. He has entered into no especial contract to carry and deliver them. He owes no duty in regard to them, by reason of his public calling that is not fulfilled, so long as he is free from gross negligence and fraud. The absence of notice to him of the purpose to carry them has prevented him from exacting a reasonable compensation for the carriage; and what is more, from making provisions for safety in measure with the increase of the hazard incurred. For the carriage of himself, his watch, his purse, and the like, the passenger does, perhaps, make contract with the carrier; or so does set in operation the duty of the latter, when he buys his ticket or takes his passage; and does, it may be, legally demand of him a care and diligence up to the needs of the hazard, and render him liable for such damage as is in the contemplation of the contract or the scope of the duty. The learned counsel for the appellant concedes and contends that the property stolen in this case is not to be considered as bag-

gage, or to be governed by the rules which have been laid down as to the loss of that and liability therefor. He puts the right to recover upon the duty of the carrier to protect the person of the passenger from violence. Is it logical to say that the defendant is not liable for the loss of these securities as baggage, or as goods, wares and merchandise; that is, that the presence of them in the car in the character of a valuable thing did not create a duty as to them, but that, by the fact of their being on the person of the plaintiff in the car, there arose from the duty to care for his person a duty to care for them? They were nothing else on his person than off of it. They did not become a part of his person, and thus evoke a duty to care for them as a part thereof. They were still property, extraordinarily in the vehicle of the defendants. Nor do we see how the fact, that the loss occurred through violence to the person of the plaintiff from other men, rather than from accident, makes a difference in the case. The defendants are bound to protect the plaintiff from the violence of a railway accident, as well as from the intentional violence of ruffians and rogues. Would it be claimed that if, in the occurrence of a railway accident, these securities had become lost from the person of the plaintiff in any of the many ways that may be imagined, with no other human intervention than was concerned in the accident itself, the defendant would have been liable for the loss? Such a case has been adjudicated in the negative, after ingenious argument and well-considered opinion. To hold otherwise, would be to extend the liability of the carrier to a new matter, by reason of the human violence and the injury therefrom; making the character alone of the act create a new duty. The carrier of pas-

sengers is liable for harm to their persons from the violence of intruders, when he has been negligent in his duty to protect from it. He is liable for harm to their property, where he has been negligent in his care of it, if confided to his care, either in fact or in law. His negligence is thus the ground of liability in both cases. But the proposition contended for would make the negligence, by which violence comes to the person and property of the passenger from other human beings, far more extensive in its consequences than the negligence by which violence comes to the person and property, or to the property alone, from inanimate things. We see no reason for this."

CHAPTER XX.

THE ACTS OF THE PASSENGER.

303 Carrier not Liable where Passenger Injures Himself.
304 Where both Carrier and Passenger are Negligent.
305 Negligence a Question of Fact.—Province of Judge and Jury.
306 Contributory Negligence.—Riding in Dangerous Place.
307 Contributory Negligence.—Riding in Dangerous Manner.
308 Contributory Negligence.—Boarding or Leaving Vehicle.
309 Contributory Negligence.—Other Cases.
310 Contributory Negligence.—Loss of Baggage.
311 Contributory Negligence.—Passenger in Sleeping Car.
312 Contributory Negligence.—Acts of Passenger Resulting from Directions of Carrier's Servants.
313 Contributory Negligence of Third Persons.
314 Contributory Negligence of Persons in Charge of Children.
315 Contributory Negligence of Carrier of Passenger.

§ 303. **Carrier not Liable Where Passenger Injures Himself.**—Not only may the carrier's negligence conduce to the injury of a passenger, but a passenger's own negligence or foolhardihood may bring him into such jeopardy that he may be seriously injured or possibly lose his life. Where, through his own negligence, a passenger is injured, there of course can be no responsibility upon the part of the carrier. It is not a carrier's duty to restrain his passengers from injuring themselves.[1] Thus, a passenger, who had escaped uninjured from a car which caught fire, was held guilty of negligence so as to bar his right of action for burns and other injuries received in rushing back into the car again for the purpose of recovering his valise.[2]

[1] Browne Carr. § 492; Indianapolis etc. R. Co. v. Rutherford, 29 Ind. 82; 92 Am. Dec. 337.

[2] Hay v. R. Co., 37 U. C. Q. B. 456.

§ 304. **Where Both Carrier and Passenger are Negligent.**—When both the carrier and the passenger have made default in that diligence and care which are necessary to prevent accident, and when, in consequence of such a combination of heedlessness, accident has actually happened, and injury to the passenger has actually been done, the passenger cannot recover damages, for it would be wrong in principle to allow him to complain to a court of law of an injury which his own negligence has contributed to cause.[1] Not only does the negligence of the plaintiff bar his recovery when he brings the action himself, but also where the action is brought by those who, under the statutes, are entitled to recover damages for his death.[2] A husband in an action for loss of his wife's services, occasioned by the negligence of another, will be charged with her contributory negligence.[3]

Neither the belief of one contributorily negligent, that he will not be injured by his negligent act, nor his ignorance of all the dangers to which he is exposed, will relieve him from its legal consequences.[4]

Although there has been negligence upon the part of a passenger, yet if the negligence upon the part of the carrier is of such a nature that the person injured could not, by the exercise of ordinary care, have

1 Galena etc. R. Co. *v.* Fay, 16 Ill. 558; 63 Am. Dec. 323; Chicago etc. R. Co. *v.* George, 19 Ill. 510; 71 Am. Dec. 239; Warren *v.* R. Co., 8 Allen, 227; 85 Am. Dec. 700; Penn. R. Co. *v.* Aspell, 23 Pa. St. 147; 62 Am. Rep. 323. In Illinois, Georgia and Tennessee the doctrine of what is called comparative negligence prevails, viz.: that if the passenger's negligence be slight when compared with that of the carrier, the latter is liable. Wabash etc. R. Co. *v.* Wallace, 110 Ill. 114; Atlantic etc. R. Co. *v* Ayres, 53 Ga. 12; Louisville etc. R. Co. *v.* Fleming, 14 Lea, 347; see Patt. Ry. Acc. L. 59.

2 3 Lawson Rights, Rem. & Pr. § 1020; 2 Thomp. Neg. 1279; Pym *v.* R. Co., 2 B. & S. 759; Tucker *v.* Chaplin, 2 C. & K. 730; Cleveland etc. R. Co. *v.* Terry, 8 Ohio St. 570; Karle *v.* R. Co., 55 Mo. 476; Gerety *v.* R. Co., 81. Pa. St. 274; Hill *v.* R. Co., 9 Heisk. 823.

3 Chicago etc. R. Co. *v.* Honey, 63 Fed. Rep. 39.

4 Muldowney *v.* R. Co., 36 Ia. 462; Ill. Cent. R. Co. *v.* Davidson, 64 Fed. Rep. 301; Chicago etc. R. Co. *v.* Landaur, 58 N. W. Rep. 434 (Neb.).

avoided the consequences, the carrier will still be liable, for in such case the passenger's negligence has not really brought about the injury. It is only where, says Mr. Browne, the plaintiff's negligence is, as it were, an attribute of the injury and not an incident, using these words in their logical sense, that his negligence can be regarded as excusing that of the defendant.[1] So although the passenger may have negligently exposed himself, yet if the injury would have happened in any event the carrier will be liable. Thus a passenger on a railroad train, who is injured by the negligence of the railroad company, is not debarred from a right to a recovery, because he was at the time he received the injury negligently riding on the platform of the car, or in some other exposed or dangerous position, if such action on his part did not contribute in any degree to the accident or to his injury. If the accident which occasioned the injury would have happened, and would have been attended with the same results to the passenger, if he had been in his proper place on the train, then his negligence is not contributory negligence, in a sense that would preclude a recovery, because it in no manner or degree contributed to the injury, and is therefore wanting in the element of proximate cause essential to constitute contributory negligence that will bar a recovery.[2] Again, if, after the negligence upon the part of the passenger, the carrier could, by the exercise of care, have avoided the consequences of such negligence, and he does not use that care, and an accident and injury ensues, the negligence of the former will

[1] Carr § 492.

[2] Kansas etc. R. Co. *v.* White, 67 Fed. Rep. 481; citing Jacobus *v.* R. Co., 20 Minn. 125; Carrico *v.* R. Co., 19 S. E. Rep. 71 (W. Va.); Kentucky etc. R. Co. *v.* Thomas, 79 Ky. 166; Railway Co. *v.* Chollette, 59 N. W. Rep. 921; St. Louis etc. R. Co. *v.* Rice, 59 Ark. 467, 11 S. W. Rep. 699; Woods *v.* R. Co., 33 Pac. Rep. 628 (Utah); Bonner *v.* Glenn, 15 S. W. Rep. 572 (Tex.); Dewire *v.* R. Co., 148 Mass. 343; 19 N. E. Rep. 523; Hutch. Carr. § 651.

not, under such circumstances, excuse the negligence of the latter.[1]

§ 305. **Negligence a Question of Fact.—Province of Judge and Jury.**—Negligence either on the part of the carrier or the passenger is a question of fact to be determined by the jury. But it is the duty of the judge to determine whether or not competent evidence has been produced which, if believed by the jury, will justify men of reasonable minds in finding a verdict in favor of the party upon whom rests the burden of proof on the particular issue.[2] Many cases in the reports in which the court lays it down that a particular act was contributory negligence, are cases where a jury has so found, and the court refuses to disturb the verdict, and are not declarations that the particular act was contributory negligence in law. For the judge to withdraw the case from the jury, the facts of the case should not only be undisputed, but the conclusions to be drawn from them undisputable. Whether the facts are disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should be left to the jury. On the other hand, if in the particular case reasonable men, unaffected by bias or prejudice would be agreed concerning the presence or absence of negligence, the judge should not submit the case to the jury, but should decide the matter as one of law.[3] This is believed to be a correct statement of the law governing the province of court and jury, respectively, though it must be admitted it has not always been adhered to in our judicial tribunals.

§ 306. **Contributory Negligence of Passenger—Riding in Dangerous Place.** —It is contributory

1 Browne Carr. § 492; Zemp *v.* R. Co., 9 Rich. 84; 64 Am. Dec. 763; Keith *v.* Pinkham, 43 Me. 501; 69 Am. Dec. 80.

2 Patt. Ry. Acc. L. 448.

3 See Lawson Rights, Rem. & Pr. where a large number of authorities are cited.

negligence in one to ride in a vehicle not intended for passengers, as on a locomotive,[1] or on the top of a cattle car,[2] or in a baggage car.[3] It is not negligence *per se* to ride on the platform of a passenger car,[4] especially when there is no room inside.[5] And in the case of horse cars, it is not contributory negligence to ride on the platform, even though there be room inside.[6] But other circumstances united with this may render the passenger negligent. Thus, where a passenger on a train, unable to find a seat, although there was standing-room inside, stood on the platform of a car, near the edge, and was thrown off by an ordinary jolt, and injured, it was held that he had no cause of action.[7] The same conclusion was reached where a passenger in a similar place, attempting to regain money blown from his hand in paying his fare, lost his foothold, and was thrown off and killed.[8]

§ 307. **Riding in Dangerous Manner.** —The passenger by rail or in a horse car is not bound to keep his seat during the whole trip,[9] and hence, it is not

[1] Robertson *v.* R. Co., 22 Barb. 91; Doggett *v* R. Co., 34 Iowa, 284; Railroad Co. *v.* Jones, 95 U. S. 439; Kresanowski *v.* R. Co., 5 McCreary, 528. See Waterbury *v.* R. Co., 21 Blatchf. 314; Lawrenceburg R. Co. *v.* Montgomery, 7 Ind. 474.

[2] Little Rock etc. R. Co. *v.* Miles, 40 Ark. 298; 48 Am. Rep. 10.

[3] Houston etc. R. Co. *v.* Clemens, 55 Tex. 88; 40 Am. Rep. 799.

[4] Macon etc. R. Co. *v.* Johnson, 38 Ga. 409; Weil *v.* R. Co., 98 N. Y. 650; Gerstle *v.* R. Co., 23 Mo. App. 361; Zemp *v.* R. Co., 9 Rich. 84; 64 Am. Dec. 763; Lafayette etc. R. Co. *v.* Sims, 27 Ind. 59; Clark *v.* R. Co., 32 Barb. 657; 36 N. Y. 135; 93 Am. Dec. 495.

[5] Willis *v.* R. Co., 32 Barb. 399; 34 N. Y. 670; Clark *v.* R. Co., 36 N. Y. 135; 93 Am. Dec. 495; Marion St. R. Co. *v.* Shaffer, 36 N. E. Rep. 861 (Ind.).

[6] Meesel *v.* R. Co., 8 Allen, 234; Augusta etc. R. Co. *v.* Renz, 55 Ga. 126; Spooner *v.* R. Co., 54 N. Y. 230; 13 Am. Rep. 570; Germantown R. Co. *v.* Walling, 97 Pa. St. 55; 39 Am. Rep. 796; Nolan *v.* R. Co., 97 N. Y. 63; 41 Am. Rep. 345; Maguire *v.* R. Co., 115 Mass. 239; Burns *v.* R. Co., 50 Mo. 139. But see Baltimore etc. R. Co. *v.* Wilkinson, 30 Md. 224; Ward *v.* R. Co., 11 Abb. Pr., N. S. 411; Andrews *v.* R. Co., 2 Mackey, 137; 27 Am. Rep. 266; Thirteenth Street R. Co. *v.* Boudreau, 92 Pa. St. 475; 37 Am. Rep. 757; Hadencamp *v.* R. Co., 1 Sweeny, 490.

[7] Camden etc. R. Co. *v.* Hoosey, 99 Pa. St. 492; 44 Am. Rep. 120.

[8] Quinn *v.* R. Co., 51 Ill. 495.

[9] Truex *v.* R. Co., 4 Lans. 108; Colwell *v.* R. Co., 57 Hun. 452; Nichols *v.* R. Co., 38 N. Y. 131; Meesel *v.* R. Co., 8 Allen, 234; Camden etc. Ferry Co. *v.* Monoghan,

negligence on his part in standing up in the moving car to view the scenery;[1] or in leaving his seat and standing in the aisle as the car reaches the station,[2] or in standing in the aisle, and making preparations to leave by brushing and plaiting a child's hair;[3] or, finding no seats vacant, continuing to stand, looking about for a seat;[4] or going to the wash room of the car while it is moving;[5] or standing near the bow of a ferry boat when it is landing.[6]

To permit one's arm or any portion of the body to be outside the window of a moving car may or may not be negligence, and whether it is, in a particular case, should be left to the jury,[7] except where carelessness would be clearly apparent from the circumstances, as if a passenger should ride with his body half out of

10 W. N. C. (Pa.) 47; The Manhasset, 19 Fed. Rep. 430; Wood *v.* R. Co., 49 Mich. 370. It may not in the case of women at least be negligent not to hold on to the straps provided in street cars. See Cent. Pass. Co. *v.* Swain, 13 W. N. Cas. 41; West Phila. Pass. Co. *v.* Whipple, 5 *id.* 68. But see Harris *v.* R. Co., 89 Mo. 223; 58 Am. Rep. 111; De Soucy *v.* R. Co., 15 N. Y. (Supp.) 108.

[1] Gee *v.* R. Co., L. R. 8 Q. B. 161.

[2] Barden *v.* R. Co., 121 Mass. 426; Wylde *v.* R. Co., 53 N. Y. 156; Baltimore etc. R. Co. *v.* Leonhardt, 66 Md. 70; Worthen *v.* R. Co., 125 Mass. 99.

[3] Railroad Co. *v.* Pollard, 22 Wall. 341.

[4] Pollard *v.* R. Co., 7 Bosw. 437; Lapourte *v.* R. Co., 114 Mass. 18.

[5] Sturdivant *v.* R. Co., 27 S. W. Rep. 170 (Tex.).

[6] Ganmon *v.* Union Ferry Co., 29 Hun. 631; Peverly *v.* City of Boston, 136 Mass. 366; 49 Am. Rep. 37.

[7] Winters *v.* R. Co., 89 Mo. 468; Barton *v.* R. Co., 52 Mo. 253; 14 Am. Rep. 418; Miller *v.* R. Co., 5 Mo. App. 471; Seigel *v.* Eisen, 41 Cal. 109; Chicago etc. R. Co. *v.* Pondrom, 51 Ill. 333; 2 Am. Rep. 306; New Jersey R. Co. *v.* Kennard, 21 Pa. St. 203; Farlow *v.* Kelly, 108 U. S. 288; Spencer *v.* R. Co., 17 Wis. 487; 84 Am. Dec. 758, the Court saying: "It is probably the habit of every person, while riding in the cars, to rest the arm upon the base of the window. If the window is open, it is likely to extend slightly outside. This, we suppose, is a common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so to accommodate the motion of the car. Passengers know this, and must regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as barely to miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence. Of course, a case might be supposed where carelessness would be clearly apparent from the circumstances." See New Jersey R. Co. *v.* Kennard, 21 Pa. St. 203. There are rulings that such conduct is negligence, *per se*. See Pittsburg etc. R. Co. *v.* McClurg, 56 Pa. St. 294; Todd *v.* R. Co., 3 Allen, 18; 80 Am. Dec. 49; 7 Allen, 207; Pittsburg etc. R. Co. *v.* Andrews, 39 Md.

the car, or with his arms or his feet so protruded that they would inevitably expose him to danger.[1]

§ 308. **Boarding or Leaving Vehicle**—While to leap upon or from a moving train is not, in all cases, contributory negligence *per se*, yet if the speed at the time be dangerously great, the passenger will generally be barred from recovering for injuries received thereby,[2] and the mere fact that a train fails to stop, as is its duty to do, or as the conductor has promised, does not justify a passenger in jumping from it while moving rapidly.[3] If the cars are going very slowly, it may not be, and this especially in the case of horse cars.[4] If it were done at the order or instance of the conductor or other officer of the train, it would be excusable,[5] but the case is different if the train has stopped a suf-

329; 17 Am. Rep. 568; Indianapolis etc. R. Co. *v.* Rutherford, 29 Ind. 82; 92 Am. Dec. 336; Morei *v.* Miss. Ins. Co., 4 Bush. 535; Louisville etc. R. Co. *v.* Sickings, 5 Bush, 1; 96 Am. Dec. 320; Holbrook *v.* R. Co., 12 N. Y. 236; 64 Am. Dec. 502; Laing *v.* Colder, 8 Pa. St. 479; 49 Am. Dec. 533.

1 Spencer *v.* R. Co., 17 Wis. 487; 84 Am. Dec. 758. It would hardly be claimed to be negligence in the case of horse cars. Miller *v.* R. Co., 5 Mo. App. 471; Dahlberg *v.* R. Co., 32 Minn. 404; 50 Am. Rep. 585; Germantown Pass. Co. *v.* Brophy, 105 Pa. St. 38; Summers *v.* R. Co., 34 La. Ann. 139; 44 Am. Rep. 419; New Orleans etc. R. Co. *v.* Schneider, 60 Fed. Rep. 210.

2 Jeffersonville etc. R. Co. *v.* Hendricks, 26 Ind. 228; Morrison *v.* R. Co., 56 N. Y. 302; Burrows *v.* R. Co., 63 N. Y. 556; 3 Thomp. & C. 44; Damont *v.* R. Co., 9 La. Ann. 441; 61 Am. Dec. 214; Dougherty *v.* R. Co., 86 Ill. 467; Gavett *v.* R. Co., 16 Gray, 501; 77 Am. Dec. 422; Lucas *v.* R. Co., 6 Gray, 64; 66 Am. Dec. 406; Ginnon *v.* R. Co., 3 Rob. (N. Y.) 25; Illinois etc. R. Co. *v.* Slatton, 54 Ill. 133; 5 Am. Rep. 109; Penn. Co. *v.* Aspell, 23 Pa. St. 147; 62 Am. Dec. 323; Evansville etc. R. Co. *v.* Duncan, 28 Ind. 441; 92 Am. Dec. 322; Detroit etc. R. *v.* Curtis, 23 Wis. 152; 99 Am. Dec. 141; Central R. Co. *v.* Letcher, 69 Ala. 106; 44 Am. Rep. 505; Masterson *v.* R. Co., 14 S. E. Rep. 571 (Ga.); Solomon *v.* R. Co., 103 N. Y. 437; 56 Am. Rep. 843; Philips *v.* R. Co., 49 N. Y. 177; 57 Barb. 644; Chicago etc. R. Co. *v.* Scates, 90 Ill. 586; Knight *v.* R. Co., 23 La. Ann. 462; Hubener *v.* R. Co., 23 La. Ann. 492; Jewell *v.* R. Co., 54 Wis. 610; 41 Am. Rep. 63; Schepers *v.* R. Co., 29 S. W. Rep. 712 (Mo.); Jacob *v.* R. Co., 63 N. W. Rep 505 (Mich.).

3 Burgin *v.* R. Co. 20 S. E. Rep. 473 (N. C.); Victor *v.* R. Co., 30 Atl. Rep. 381 (Pa.).

4 Peoples Pass. Co. *v.* Green, 56 Md. 84; McDonough *v.* R. Co., 137 Mass. 210; Eppendorf *v.* R. Co., 69 N. Y. 195; 25 Am. Rep. 171; Morrison *v.* R. Co., 130 N. Y. 166; Moylan *v.* R. Co., 59 Hun. 619; 128 N. Y. 583; Connor *v.* R. Co., 105 Ind. 62; Stager *v.* R. Co., 119 Pa. St. 70; Briggs *v.* R. Co., 148 Mass. 72; Gawley *v.* R. Co., 7 N. Y. (Supp.) 854; McLaughlin *v.* R. Co., 12 N. Y. (Supp.) 458; Wyatt *v.* R. Co., 55 Mo. 485; Crissey *v.* R. Co., 75 Pa. St. 83; Philadelphia etc. R. Co. *v.* Hassard, 75 Pa. St. 367.

5 *Post* § 312.

ficient length of time for passengers to get off, and the attempt to do so is made after the train has started;[1] or if the passenger gets off after being warned that the train has not yet reached the station;[2] or knowing that the train will stop at the station, he leaps off before it has come to a stop.[3]

The question must be decided in the light of the surroundings,[4] and two Pennsylvania cases well illustrate this. In *Pennsylvania Railroad Company* v. *Aspell*,[5] a passenger was riding to a station, but on account of a defect in the bell rope which prevented the conductor from giving the signal, the train passed the station, although at a slackened speed. The plaintiff, seeing that he was going to be carried beyond, jumped from the car and injured his foot. It was held that he could not recover damages, the court saying: "If a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be left off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back; because these are the direct consequences of the wrong done him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame no body but himself. If there be any man who does not know that such leaps are extremely dangerous, especially when taken in the dark, his friends should see that he does not travel by railroad." In *Pennsylvania Railroad Company* v. *Kilgore*,[6] the plain-

1 Illinois etc. R. Co. *v.* Slatton, 54 Ill. 139; 5 Am. Rep. 109; Tex. etc. R. Co. *v.* McGilvary, 29 S. W. Rep. 67 (Tex.).

2 Ohio etc. R. Co. *v.* Schiebe, 44 Ill. 460.

3 Ohio etc. R. Co., *v.* Stratton, 78 Ill. 88; South. etc. R. Co. *v.* Schauffler, 75 Ala. 139. Compare Kentucky etc. R. Co. *v.* Dills, 4 Bush, 593.

4 Johnson *v.* R. Co., 70 Pa. St. 359; Texas etc. R. Co. *v.* Murphy, 46 Tex. 356; 26 Am. Rep. 272.

5 23 Pa. St. 147; 62 Am. Dec. 323.

6 32 Pa. St. 272; 72 Am. Dec. 787; Loyd *v.* R. Co., 53 Mo. 509.

tiff, accompanied by three young children, on arriving at her destination, proceeded to alight; two of the children had done so, and while the plaintiff was still on the train, the cars started, when she sprang upon the platform of the station, on which one of the children had fallen prostrate, and was injured. It was held that this was not such negligence as would prevent her recovering damages. The court here said: "That it is wrong for a party to attempt to leave cars whilst they are in motion, is an abstract truth that counsel complain of the court for not misapplying here. It is one thing to define a principle of law, and a very different matter to apply it well. The rights and duties of parties grow out of the circumstances in which they are placed. It was as natural for this woman to leave the cars as she did in her circumstances, as it was rash for Aspell to leap from them, in his circumstances. It would be as unreasonable to impute negligence to her, as it would have been to have held the company responsible to him."

In a recent case in Louisiana it was held that a passenger on a train, with a ticket for a station at which it is customary for the train not to stop, but to slow its movement, so as to allow passengers to alight, will be entitled to damages if, called to the platform by the announcement of the station, he is thrown from the steps of the car and injured; his fall being caused by the sudden increase of the speed of the train, when it should have been slowed or stopped.[1] The court said that the cases in the reports where it is held that the passenger carried beyond his station, cannot recover damages caused by jumping from a moving train, have no application to this case. "The plaintiff was invited by the train signal to leave his seat and go to the plat-

[1] Brashaer *v.* R. Co., 17 South. Rep. 261.

form. Under the natural expectation that the train would slow, if not stop, to enable him to alight, it cannot be deemed negligence that he stood on the steps of the car. It is urged on us that his station was passed, and he went from one, i. e. the station, side, to the other, and was standing on the steps on that side when the accident occurred. This was because he supposed, as he states, not putting him out at the station, it was intended to slow up at the mill, a few feet beyond. We cannot hold that this change in his position, induced by the natural expectation of a chance to alight that the company owes to its passengers, charges the plaintiff with negligence. Called to the platform and to the steps of the car,—for that is the significance of the whistle, and the announcement of the station by the train official,—the train is neither slowed nor stopped, passes the station and the mill with a speed accelerated, when it should have been diminished, and the result is that the plaintiff is thrown to the ground and injured. We think the record shows a case of responsibility of the defendant."

A passenger may be placed in a perilous situation, where the only escape he sees is to leap from the moving vehicle. He does so, and is injured, while had he not taken this step, he would have received no hurt, the danger being apparent and not real. Nevertheless, the carrier will be responsible, if his neglect has forced upon the passenger, in the words of Lord Ellenborough, "a perilous alternative."[1] One cannot, through his default, put another in peril, and then demand that he shall exercise a high degree of prudence in extricating himself.[2] If, however, the passenger acts on a rash

1 Jones *v.* Boyce, 1 Stark. 493.

2 Ingalls *v.* Bills, 9 Met. 1; 43 Am. Dec. 346; Frink *v.* Potter, 17 Ill. 406; McKinney *v.* Neil, 1 McLean, 540; Buel *v.* R. Co., 31 N. Y. 314; 88 Am. Dec. 271; Eldridge *v.* R. Co., 1 Sand. 69; Wilson *v.* R.

apprehension of danger which did not exist, and considering all the circumstances, did what an ordinarily prudent man would not have done, the carrier is not liable. "If," as has been said, "a man wrongfully menaced with a switch, should purposely leap over a dangerous precipice in order to escape a possible stroke, it could hardly be claimed that he could recover for an injury caused by the stroke." Thus, where a passenger in the caboose of a moving freight train, frightened by the falling of a pile of lumber from a flat-car next before the caboose, jumped out, it was held that he was to blame for the injuries sustained, even though the company was negligent in piling the lumber so that it could fall.[1] The question is, however, always one of reasonable cause, and in a novel case in Missouri, a carrier was held liable for injuries to a passenger who leaped from a moving train through fear induced by the conductor and several passengers as a hoax, pretending to be robbers, and to be about to bind him and throw him from the train.[2] In a somewhat similar case in Michigan, a judgment was affirmed against a street railroad company in an action by a woman, who, to avoid the repetition of an insult, jumped from a moving car.[3] And of course, though the grounds of apprehension of danger are reasonable, if they are not caused by the fault of the carrier, he is not liable.[4] In an Illinois case,[5] a train running on a double track road was stopped by a snow bank.

Co., 23 Minn. 278; 37 Am. Rep. 410; Southwestern R. Co. *v.* Paulk, 24 Ga. 356; Iron R. Co. *v.* Mowery, 36 Ohio St. 418; 38 Am. Rep. 597; Pitts. etc. R. Co. *v.* Martin, 82 Ind. 476; Huff *v.* R. Co., 14 Fed Rep. 558; Lawrence *v.* Green, 70 Cal. 417; 59 Am. Rep. 428; Twomley *v.* R. Co., 69 N. Y. 158; 25 Am. Rep. 162; Gulf etc. R. Co. *v.* Wallen, 65 Tex. 568.

1 Woolery *v.* R. Co., 107 Ind. 381; 57 Am. Rep. 114; Gulf etc. R. Co. *v.* Wallen, 65 Tex. 568; St. Louis etc. R. Co. *v.* Murray, 18 S. W. Rep. 50 (Ark.).

2 Spohn *v.* R. Co., 87 Mo. 74; 101 *Id.* 418; 116 *Id.* 617; 122 *Id.* 1; 14 S. W. Rep. 880.

3 Ashton *v.* R. Co., 44 N. W. Rep. 141.

4 Kleiber *v.* R. Co., 17 S. W. Rep. 946.

5 Chicago etc. R. Co. *v.* Felton, 125 Ill. 458; 17 N. E. Rep. 765.

There was a curve on the track at that point and during the night some of the passengers saw the approaching light of a locomotive which they supposed was on the same track with them, and heard several short, sharp whistles which they took for danger signals. One of the passengers, the plaintiff, being greatly alarmed and fearing a collision ran out of the car, and in jumping from the train was injured. The light was from a snow plow which was on the other track and which had been sent to assist the blocked train. It was held that the carrier was not liable. The Court said that the blowing of the whistle being the proper signal to acquaint those in charge of the passenger train of the approach of the snow plow was not negligence. The purpose of giving signals of this kind is not to notify the passenger but to notify those in charge of the train of the presence of the approaching train. "Communications are ordinarily made with passengers in regard to matters affecting them, personally by the conductor, more rarely by porters or other employees, but the passenger is never required to understand and heed any signal given by the whistle of the engine. The running into the snow bank by the passenger train was an inevitable casualty, and the carrier was proceeding with care to extricate the train from the bank. There was no negligence on the part of any of the employees of the company, and without proof of some neglect on their part, the carrier could not be held responsible for the injury."

The carrier is likewise liable for an injury incurred by a passenger in attempting, by an act not obviously dangerous, to obviate an inconvenience to himself, caused by the carrier's fault.[1] In Maryland, a passenger, while sitting near the front door of a crowded

[1] Patt. Ry. Acc. L. 15.

and dark car, in passing through a long tunnel, attempted to shut the door (there being no one at hand to do it), in order to keep out the smoke and cinders, and received an injury in doing so. The carrier was held liable.[1]

309. **Other Cases.** — It has been held not contributory negligence *per se* to board a train at a place not the station platform,[2] nor is it necessarily negligent to get upon a crowded excursion car,[3] nor to step upon a connecting link between two cars in alighting, after the train had stopped;[4] nor to stand on the deck of a ship under a suspended boat;[5] or in the carriage way of a ferry boat;[6] nor to place one's hand on an open door or the door jamb, to aid in mounting the steps.[7] But it is negligence to crawl under a freight train with steam up.[8]

§ 310. **Loss of Baggage.** —The negligence of the passenger may bar an action against a carrier for the loss of his baggage, as where a passenger, on leaving the train at his destination, forgot to take his overcoat which he had placed on the seat;[9] where, on leaving the

1 West. R. Co. *v.* Stanley, 61 Md. 266; 48 Am. Rep. 96; See *v.* R. Co., L. R. 8 Q. B. 161; Adams *v.* R. Co., L. R. 4 C. P. 744.

2 Stover *v.* R. Co., 98 Ind. 384; 49 Am. Rep. 764.

3 Lynn *v.* R. Co., 36 Pac. Rep. 1018 (Cal.).

4 Johnson *v.* R. Co., 11 Minn. 276; 88 Am. Dec. 83.

5 Simmons *v.* R. Co., 97 Mass. 361; 100 Mass. 34.

6 Hazman *v.* Hoboken Land etc. Co., 2 Daly 130.

7 Fordham *v.* R. Co., L. R. 3 C. P. 368; Coleman *v.* R. Co., 4 H. & C. 699.

8 Chicago etc. R. Co. *v.* Cross, 73 Ill. 394; Chicago etc. R. Co. *v.* Dewey, 26 Ill. 255; 79 Am. Dec. 374. But see Allender *v.* R. Co., 37 Ia. 264.

9 Tower *v.* R. Co., 7 Hill, 47; 42 Am. Dec. 36, the Court saying: "The loss in this case occurred through the gross neglect of the plaintiff. Common sense and attention on his part would have prevented it. A passenger might as reasonably complain because he had forgotten to leave the cars at the point of destination and been carried beyond it, as to do so in a case like the present. The carrier is not bound to act as guardian for his passenger, and treat him as a ward under age. The passenger must at least assume the responsibilty of taking ordinary care of himself, including the wearing apparel about his person."

car he left his pocket book behind on the seat;[1] where a passenger whose portmanteau had been placed at his request, in the car with him, got out at a way station and then carelessly failed to get into the same car again, but finished his journey in another car.[2] And it has been ruled in the Supreme Court of the United States that a railroad is not liable for a loss resulting to a passenger from its refusal to stop the train upon which he was riding, short of a usual station, to enable him to recover a hand-bag containing a large sum of money and valuable jewelry which he was carrying with him, and which he dropped from the window of the car, while attempting to lower the sash.[3]

§ 311. **Passenger on Sleeping Car.**—A passenger on a sleeping car was held guilty of contributory negligence which would bar his action for the property stolen, where, on getting out of his berth in the morning, he went to the lavatory, leaving in the pockets of his vest under his pillow, his watch and a large sum of money.[4] So, where, on leaving the car at a station for refreshments, he left his satchel on the sill of an open window within easy reach of anyone on the platform.[5]

§ 312. **Acts of Passengers Resulting from Directions of Carrier's Servants.**—Where the dangerous position is assumed by direction or invitation of the servant of the carrier, or on his representation that it is not unsafe, the carrier will be liable.[6] This has been

1 Ill. Cent. R. Co. *v.* Handy, 63 Miss. 609; 56 Am. Rep. 846.

2 Talby *v.* R. Co., L. R. 6 C. P. 44.

3 Henderson *v.* R. Co., 20 Fed. Rep. 430; 123 U. S. 61, 8 S. Ct. Rep. 60.

4 Root *v.* Sleeping Car Co., 28 Mo. App. 199; Wilson *v.* R. Co., 32 Mo. App. 682.

5 Whitney *v.* Pull. Pall. Co., 143 Mass. 243.

6 O'Donnell *v.* R. Co., 59 Pa. St. 239; 98 Am. Dec. 336; Penn. R. Co. *v.* McCloskey, 23 Pa. St. 526; Edgerton *v.* R. Co., 39 N. Y. 227; Indianapolis etc. R. Co. *v.* Horst, 93 U. S. 291; Louisville etc. R. Co. *v.* Kelly, 92 Ind. 371; Poole *v.* R. Co., 56 Wis. 227; Creed *v.* R. Co., 86 Pa. St. 139; Colegrove *v.* R. Co., 20 N. Y. 462; Waterbury *v.* R. Co., 17 Fed. Rep. 671.

ruled where the passenger has been invited by the carrier's servant, to ride in a vehicle not otherwise a proper vehicle;[1] or on the platform of a car;[2] or passing from one car to another while in motion;[3] or entering the train at a wrong time or place;[4] or crossing tracks to reach a car;[5] or going under a freight car for the same purpose;[6] or leaving the train while in motion;[7]— all at the invitation or direction of a servant of the carrier.

There are cases in which this principle has been denied;[8] and it is generally not applicable where the danger is so obvious that a reasonably careful man would not obey the order or accept the invitation;[9] or where the servant was not expressly or impliedly authorized to give the invitation.[10]

§ 313. **Contributory Negligence of Third Persons.** —The carrier is responsible for an injury to a passenger caused by the concurrent negligence of the carrier and a third person not connected with him, the plaint-

1 As on the locomotive: Hanson *v.* R. Co., 38 La. Ann. 111; 58 Am. Rep. 162; Waterbury *v.* R. Co., 17 Fed. Rep. 672; in the baggage car: O'Donnell *v.* R. Co., 59 Pa. St. 239; 98 Am. Dec. 336; Watson *v.* R. Co. 24 U. C. Q. B. 98; Carroll *v.* R. Co., 1 Duer, 571; Washburn *v.* R. Co., 3 Head, 638; 75 Am. Dec. 784; Kentucky R. Co. *v.* Thomas, 79 Ky. 160; 42 Am. Rep. 208.

2 Sheridan *v.* R. Co., 36 N. Y. 39; 93 Am. Dec. 490.

3 Cleveland etc. R. Co. *v.* Manson, 30 Ohio St. 451; Louisville etc. R. Co. *v.* Kelly, 92 Ind. 526; McIntyre *v.* R. Co., 37 N. Y. 287.

4 Detroit, etc. R. Co. *v.* Curtis, 23 Wis. 152; 99 Am. Dec. 141; Allender *v.* R. Co., 43 Ia. 276.

5 Balt. etc. R. Co. *v.* State, 63 Md. 135; Warren *v.* R. Co., 8 Allen, 227.

6 Chicago etc. R. Co. *v.* Sykes, 96 Ill. 362.

7 Georgia etc. R. Co. *v.* McCurdy, 45 Ga. 288; 12 Am. Rep. 577; Lambeth *v.* R. Co., 66 N. C. 494; 8 Am. Rep. 508; Lovett *v.* R. Co., 9 Allen, 557; Filer *v.* R. Co., 68 N. Y. 124; 59 N. Y. 351; 49 N. Y. 47; Wyatt *v.* R. Co., 55 Mo. 485; Doss *v.* R. Co., 59 Mo. 27; 21 Am. Rep. 371; Illinois etc. R. Co. *v.* Able, 59 Ill. 131; Chicago etc. R. Co. *v.* Randolph, 53 Ill. 510; 5 Am. Rep. 60; Galveston etc. R. Co. *v.* Smith, 59 Tex. 406; Bucher *v.* R. Co., 98 N. Y. 128; International R. Co. *v.* Hassell, 62 Tex. 256; 50 Am. Rep. 525; Balt. etc. R. Co. *v.* Leafley, 65 Md. 571; St. Louis etc. R. Co. *v.* Cantwell, 37 Ark. 519.

8 Bardwell *v.* R. Co., 63 Miss. 574; 56 Am. Rep. 842; Penn. R. Co. *v.* Langdon, 92 Pa. St. 21; 37 Am. Rep. 651.

9 Hazzard *v.* R. Co., 1 Biss. 503; Chicago etc. R. Co. *v.* Randolph, 53 Ill. 510; Balt. etc. R. Co. *v.* Jones, 95 U. S. 439; South. etc. R. Co. *v.* Singleton, 67 Ga. 316; 66 *Id.* 252.

10 Lafayette etc. R. Co. *v.* Miles, 40 Ark. 298; Flower *v.* R. Co., 69 Pa. St. 210; Duff *v.* R. Co., 91 Pa. St. 458.

iff.[1] In one case, a stage-coach, by the negligence of the driver, was precipitated into a dry canal; the lock-keeper negligently opened the gates of the canal, and drowned the passenger;[2] in another, a boy, a passenger on a street car, was compelled by the conductor, to stand on the platform, from which he was thrown and injured by the negligence of another passenger in leaving the car.[3] In both these cases the carrier was held liable.

§ 314. **Contributory Negligence of Persons in Charge of Children.**—A child of tender years cannot be guilty of contributory negligence,[4] so as to bar its action for damages for a negligent tort. And contributory negligence on the part of its parents or guardians in permitting it to wander at large, will not, in most of States,[5] bar the recovery of damages, unless at the time the parent or guardian was present, directing its acts.[6] But where the action is for a tort founded upon a contract, the contributory negligence of the contracting party, will bar a recovery by the person on whose behalf the contract was made.[7] In a leading English case, the plaintiff, a child of five, was in charge of its grandmother, who procured tickets for both at the sta-

1 Byrne *v.* Wilson, 15 I. R. C. L. N. S. 332; Sheridan *v.* R. Co., 36 N. Y. 39; 93 Am. Dec. 490; Eaton *v.* R. Co., 11 Allen, 500; 87 Am. Dec. 730; Spooner *v.* R. Co., 54 N. Y. 230; 13 Am. Rep. 570; St. Joseph etc. R. Co. *v.* Hedge, 62 N. W. Rep. 587 (Neb.); McDonald *v.* R. Co., 17 South. Rep. 873 (La.).

2 Byrne *v.* Wilson, 15 I. R. C. L. N. S. 332.

3 Sheridan *v.* R. Co., 36 N. Y. 39; 93 Am. Dec. 490.

4 Lawson Rights, Rem. & Pr. § 1208. Magnan *v.* R. Co., 38 N. Y. 455; 98 Am. Dec. 66; O'Mara *v.* R. Co., 38 N. Y. 445; 98 Am. Dec. 61; Daly *v.* R. Co., 26 Conn. 591; 68 Am. Dec. 413; Schmidt *v.* R. Co., 23 Wis. 186; 99 Am. Dec. 158; East Tenn. R. Co. *v.* St. John, 5 Sneed 524; 73 Am. Dec. 149; Frick *v.* R. Co., 75 Mo. 595; Central Trust Co. *v.* R. Co., 31 Fed. Rep. 246.

5 Winters *v.* R. Co., 99 Mo. 509. The contrary is here in other States. See the cases collected in Lawson Rights, Rem. & Pr. § 1210.

6 Grethen *v.* R. Co., 22 Fed. Rep. 609; Stillson *v.* R. Co., 67 Mo. 671.

7 Patt. Ry. Acc. L., 88.

tion, but in crossing the track for the purpose of reaching a platform, they were run down by a train, under circumstances (as a jury found), of concurrent negligence on the part of the grandmother and the servants of the railroad. The grandmother was killed, and the plaintiff suffered personal injuries, for which the suit was brought. It was held that the infant could not recover. Cockburn, C. J., said that where a person of tender years, unable to take care of himself, presents himself for passage on a vehicle, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. And Pollock, C. B., thought that there was no difference between a person of tender years under the care of another, and a valuable chattel, so far as the responsibility of the carrier was concerned.[1] This principle has been followed in the United States.[2] In one case an infant twelve years of age in the care of her parents, was a passenger upon defendant's cars. As the train approached the station where she was to alight, the conductor called out the name of the station and the cars stopped. It was evening and dark. Plaintiff and her parents arose to leave, but before they got out of the car the train started and moved slowly by the station. They, knowing the train was in motion, passed out on the platform of the car, and while the train was still moving, and after it had passed the platform of the station, plaintiff's father took her under his arm, stepped from the car, fell, and she was injured. It was held that plaintiff, was chargeable with the contributory negligence of her father in charge of her.[3]

[1] Waite *v.* R. Co., El. B. & El. 719.

[2] Ohio etc. R. Co. *v.* Stratton, 78 Ill. 88; Fleming *v.* R. Co., 1 Abb. N. C. 433; Willets *v.* R. Co., 14 Barb. 1210; The Burgundia, 29 Fed. Rep. 464.

[3] Morrison *v.* R. Co., 56 N. Y. 212; Ohio etc. R. Co. *v.* Stratton, *supra.*

§ 315. **Contributory Negligence of Carrier of Passengers.** —The negligence of the carrier cannot be imputed to the passenger. In the celebrated English case of *Thorogood* v. *Bryan*,[1] a passenger in an omnibus, in alighting, was run over by an omnibus of another line owned by the defendant. There was negligence both on the part of the plaintiff's driver and the defendant's driver, and it was held that the plaintiff was so identified with his driver, being under his control at the time, so to speak, that his negligence barred a recovery. This decision has not been followed in England,[2] and is probably now overruled.[3] Except in Pennsylvania,[4] the doctrine of *Thorogood* v. *Bryan* has been repudiated in the United States, for the reasons given by Mr. Justice Field, in *Little* v. *Hackett*:[5] "The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger; and his asserted identity with them is contradicted by the daily experience of the world."[6]

1 8 C. B. 115.

2 See Rigby *v.* Hewitt, 5 Ex. 240.

3 See The Bernona, L. R. 12 P. D. 58.

4 Lockhart *v.* Lichtenthaler, 46 Pa. St. 164.

5 116 U. S. 336.

6 Bennett *v.* R. Co., 36 N. J. L. 225; 13 Rep. 435; Chapman *v.* R. Co., 19 N. 341; 75 Am. Dec. 344; Colgrove *v.* R. Co., 20 N. Y. 492; 6 Duer, 382; Webster *v.* R. Co., 38 N. Y. 260; Danville Co. *v.* Stewart, 2 Met. (Ky.) 119; Louisville etc. R. Co. *v.* Case, 9 Bush, 728; Johnson *v.* R. Co., 32 N. Y. 597; 88 Am. Dec. 353; Holzab *v.* R. Co., 38 La. Ann. 185; 58 Am. Rep. 177; Perez *v.* R. Co., 47 La. Ann. 1; 17 South. Rep. 869.

PART IV.

OTHER EXCEPTIONAL BAILMENTS.

CHAPTER XXI.

THE TELEGRAPH, TELEPHONE AND OTHER MODERN AGENCIES.

SECTION 316. Duties and Obligations of Telegraph Companies.
317. Telegraph Company not an Insurer.
318. Action may be Brought by Addressee.
319. Limitation of Liability by Contract.
320. Conditions Contained in Telegraph Blanks.
321. Connecting Lines.
322. Contributory Negligence of Sender.
323. Telephone Companies.
324. Sleeping Car Companies not Common Carriers.
325. Not Liable as Innkeepers.
326. Contrary View — Sleeping Car Company Liable as an Innkeeper.
327. This View Sustained in Nebraska.
328. The Liability of the Sleeping Car Company.
329. Passenger Elevators.
330. Postmasters and Mail Carriers.

§ 316. **Duties and Obligations of Telegraph Companies.** —Like the common carrier, the telegraph company is a public agency, subject to public regulation and control.[1] It is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers.[2] It is a public institution serving a public purpose. Nor does it do so without consideration for "the exercise of the right of eminent domain, is a condition essentially pre-

1 Western U. Tel. Co. *v.* Carew, 15 Mich. 525; New York, etc. Tel. Co. *v.* Dryburg, 35 Pa. St. 302; 78 Am. Dec. 338; Western U. Tel. Co. *v.* Bartlett, 62 Me. 217; 16 Am. Rep. 437; De Rutte *v.* Tel. Co., 30 How. Pr. 413; 1 Daly, 517; Wann *v.* Tel. Co., 37 Mo. 481; 90 Am. Dec. 395; Tyler *v.* Tel. Co., 74 Ill. 168; Passmore *v.* Tel. Co., 78 Pa. St. 242; Ellis *v.* Tel. Co., 13 Allen, 226; Fowler *v.* Tel. Co., 80 Me. 331; 6 Am. St. Rep. 211; 15 Atl. Rep. 29; 2 Stim. Am. St. L. 8950.

2 West. U. Tel. Co. *v.* Call Pub. Co., 62 N. W. Rep. 506 (Neb.).

cedent to its existence, and special laws are generally enacted for the preservation of its property and for secrecy of business communications made over its lines."[1] It must transmit for all who apply; must not give a preference to one customer over another,[2] and must forward messages in the order in which they are received, except that private dispatches must give way to public matters, or communications between public officers.[3] This is expressly declared in the statutes of Arkansas, Colorado, Georgia, Illinois, Indiana, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, Utah, Virginia, Tennessee, and Washington. The effect of such statutes is to take the business of conducting and managing a telegraph line out of the class of ordinary occupations, and to make it a public employment, to be carried on with a view to the general benefit, and for the accommodation of the community, and not merely for private emolument and advantage. Under these provisions, an owner or manager of such a line becomes, to a certain extent, a public servant or agent.[4]

The telegraph company may, however, refuse a message which, on its face is obscene or indecent,[5] or is for a notoriously illegal purpose.[6] The business of telegraphing or the sending of a telegram is not a work of necessity as a matter of law, so as to take a con-

1 2 Thomp. Neg. 835; Primrose *v.* Tel. Co., 154 U. S. 1; 14 S. C. Rep. 1098.

2 Laws. Rights, Rem. & Pr. § 1956; West. U. Tel. Co. *v.* Ward, 23 Ind. 377; U. S. Tel. Co. *v.* Tel. Co., 56 Barb. 46; Davis *v.* Tel. Co., 1 Cin. 100; Smith *v.* Tel. Co., 42 Hun. 454; Freedman *v.* Tel Co., 32 Hun. 4; West. U. Tel. Co. *v.* Call Pub Co., *supra;* Primrose *v.* Tel. Co., *supra.*

3 West. U. Tel. Co. *v.* Ward, 23 Ind. 377; 85 Am. Dec. 463.

4 Bigelow, C. J., in Ellis *v.* Tel. Co., 13 Allen, 226.

5 *Aliter* if nothing immoral or illegal appears on its face and the plea is that it was sent for an illegal or immoral purpose as in West. U. Tel. Co. *v.* Ferguson, 57 Ind. 495, where the message read: "Send me four girls, on first train to Francesville, to tend fair."

6 Smith *v.* Tel. Co., 84 Ky. 664; 2 S. W. Rep. 483.

tract to send and deliver a message out of the Sunday laws. But if the telegram on its face, or by extrinsic evidence is shown to be in regard to a work of necessity or charity, it would not be obnoxious to those laws.[1]

§ 317. **Telegraph Company not an Insurer.**—Although there would appear at first sight to be no difference in the general nature of the legal obligation between carrying a message along a wire and carrying goods or a package along a route, the physical agency being different, but the essential nature of the contract being the same, yet, except in one or two early cases,[2] the American Courts[3] have refused to hold telegraph companies to the extraordinary responsibility of a common carrier of goods, and to make them insurers of the correct transmission of messages received by them.[4] In a well considered case in Michigan,[5] it is said: "We are all agreed that telegraph companies, in the absence of any provision of statute imposing such liability, are not common carriers, and

1 Rogers *v.* Tel. Co., 78 Ind. 100; 41 Am. Rep. 558; Gulf etc. R. Co. *v.* Levy, 59 Tex. 542; 46 Am. Rep. 269.

2 See Parks *v.* Tel. Co., 13 Cal. 422; 73 Am. Dec. 589; McAndrew *v.* Tel. Co., 17 C. B. 3; Bowen *v.* Tel. Co., Allen Tel. Cas. 7; 1 Am. L. Reg. 685, where this view is taken.

3 In England the telegraph is now owned by the government and managed as a branch of the post office department. The English cases are therefore not in point here.

4 Binney *v.* R. Co., 18 Md. 341; 81 Am. Dec. 607; New York etc. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; 78 Am. Dec. 338; Shields *v.* Tel. Co., 11 Am. L. T. 311; Allen's Tel. Cas. 7; West. U. Tel. Co. *v.* Ward, 23 Ind. 377; 85 Am. Dec. 462; West. U. Tel. Co. *v.* Carew, 15 Mich. 525; Ellis *v.* Tel. Co., 13 Allen, 226; United States Tel. Co. *v.* Gildersleeve, 29 Md. 232; 96 Am. Dec. 519; Baldwin *v.* Tel. Co., 45 N. Y. 744; 6 Am. Rep. 165; 54 Barb. 506; 6 Abb. Pr., N. S., 405; 1 Lans. 195; Leonard *v.* Tel. Co., 41 N. Y. 544; 1 Am. Dec. 446; Passmore *v.* Tel. Co., 78 Pa. St. 238; Bryant *v.* Tel. Co., 1 Daly, 575; De Rutte *v.* Tel Co., 30 How. Pr. 403; 1 Daly, 547; Wann *v.* Tel. Co., 37 Mo. 472; 90 Am. Dec, 395; Washington etc. Tel. Co. *v.* Hobson. 15 Gratt. 122; Bartlett *v.* Tel. Co., 62 Me. 209; West. U. Tel. Co. *v.* Fontaine, 58 Ga. 433; Camp. *v.* Tel. Co., 1 Met. (Ky.) 164; 71 Am. Dec. 461; Aiken *v.* Tel. Co., 5 S. C. 358; Fowler *v.* Tel. Co., 80 Me. 381; 6 Am. St. Rep. 211; 15 Atl. Rep. 29; West. U. Tel. Co. *v.* Munford, 87 Tenn. 190; 10 Am. St. Rep. 630; 10 S. W. Rep. 318; Gillis *v.* Tel. Co., 61 Vt. 461; 17 Atl. Rep. 736.

5 West. U. Tel. Co. *v.* Carew, 15 Mich. 525.

that their obligations and liabilities are not to be measured by the same rules; that they do not become insurers against all errors in the transmission or delivery of messages, except so far as by their rules and regulations, or by contract, or otherwise, they choose to assume that position, or hold themselves out as such to the public, or to those who employ them. The statute of this State authorizing such companies, and to some extent prescribing their duties and liabilities, imposes no such liability. Impartiality and good faith are the chief, if not the only, obligations required by the statute, so far as relates to the question here involved. Beyond these statute requirements, their obligations must be fixed by considerations growing out of the nature of the business in which they are engaged, the character of the particular transactions which may arise in the course of their business, and the application of the principles of justice and public policy recognized alike by common sense and the common law. The statutes of the other States in reference to this branch of business are, in the main, substantially like our own. Telegraph companies, like common carriers, it is true, exercise a public employment; and the former are bound to send messages for those who apply and are ready to pay the usual or settled charges, as the latter are bound to transport goods for those who seek their services, upon similar terms; and, doubtless, the same rule for securing impartiality would apply to both, except as modified by statute. But, beyond this, as relates to the actual transportation of goods in the one case and the transmission of ideas in the other, there is, in the nature of things and the different means and agencies employed, but very little substantial resemblance; and any analogy must be more fanciful than real, and likely to lead to error

and injustice." And the reasons for the distinction are well stated in a New York case,[1] where Johnson, J., says: "I cannot refrain from observing here, that the business in which the defendant is engaged, of transmitting ideas only from one point to another, by means of electricity operating upon an extended and insulated wire, and giving them expression at the remote point of delivery by certain mechanical sounds, or by marks or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter are controlled and regulated, can have very little just and proper application to the former. And all attempts heretofore made by courts to subject the two kinds of business to the same legal rules and liabilities will, in my judgment, sooner or later have to be abandoned as clumsy and undiscriminating efforts and contrivances to assimilate things which have no natural relation or affinity whatever, and, at best, but a loose and mere fanciful resemblance. The bearer of written or printed documents and messages from one to another, if such was his business or employment, might very properly be called and held a common carrier; while it would obviously be little short of an absurdity to give that designation or character to the bearer of mere verbal messages, delivered to him by mere signs of speech, to be communicated in like manner. The former would have something which is, or might be, the subject of property, capable of being lost, stolen,

1 Breese *v.* Tel. Co., 45 Barb. 274; 31 How. Pr. 816.

and wrongfully appropriated; while the latter would have nothing in the nature of property which could be converted or destroyed, or form the subject of larceny, or of tortious caption and appropriation, even by the 'king's enemies.'" And in a very recent case in the Supreme Court of the United States, Mr. Justice Gray, says:[1] "Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers. Their duties are different, and are performed in different ways; and they are not subject to the same liabilities. The rule of the common law by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods. The identity of the goods which he receives, with those which he delivers, can hardly be mistaken. Their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods. But telegraph companies are not bailees, in any sense. They are intrusted with nothing but an order or message, which is not to be carried in the form or characters in which

[1] Primrose *v.* Tel. Co., 154 U. S. 1; 14 S. C. Rep. 1091.

it is received, but is to be translated and transmitted through different symbols, by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement. It is of no intrinsic value. Its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose. It may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company."

The telegraph company is required, however, to use good apparatus and instruments, and reasonable skill and a high degree of care and diligence in their operation, and for the want of these it will be liable to persons injured thereby[1]

It must forward a message received, within a reasonable time,[2] and is responsible for its agent's negligence in not knowing the existence of places where its offices are located,[3] or in attempting to send a message which he knows, on account of atmospheric disturbances cannot be correctly transmitted,[4] or for negligently delivering forged dispatches,[5] and for the frauds of its agents in sending false and fraudulent dispatches.[6]

1 Cases cited in last note: West. U. Tel. Co. *v.* Carew, 15 Mich. 525; Abraham *v.* Tel. Co., 23 Fed. Rep. 315; Fowler *v.* Tel. Co., 80 Me. 381; 6 Am. St. Rep. 211; 15 Atl. Rep. 29; West. U. Tel. Co. *v.* Cook, 61 Fed. Rep. 624. Other phrases descriptive of what the law requires in this case are to be found in the reports, but they have substantially the meaning above. See Ellis *v.* Tel. Co., 13 Allen, 226; Passmore *v.* Tel. Co., 78 Pa. St. 238; Baldwin *v.* Tel. Co., 45 Barb. 505; 45 N. Y. 744; 6 Am. Rep. 165.

2 But at small offices it is not bound to have an operator constantly present to receive. Behm *v.* Tel. Co., 8 Biss. 131. The reasonableness of a regulation as to the time of closing offices is for the jury. Brown *v.* Tel. Co., 21 Pac. Rep. 991.

3 West. U. Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744.

4 West. U. Tel. Co. *v.* Cohen, 73 Ga. 522.

5 Strause *v.* Tel. Co., 8 Biss. 104; Elwood *v.* West. U. Tel. Co., 45 N. Y. 549; 6 Am. Rep. 140. *Aliter*, of course, where there is no want of care on the part of its agent. West. U. Tel. Co. *v.* Meyer, 61 Ala. 158; 32 Am. Rep. 1.

6 McCord *v.* Tel. Co., 39 Minn. 181; 39 N. W. Rep. 315; Brown *v.* Tel. Co., 5 Cent. L. J. 265 (Cal.).

It must deliver its messages within a reasonable time,[1] and this whether it is notified of their special importance or not.[2] It must make a reasonable effort to find the addressee, and this is not done by looking for him at his place of business only.[3] A delivery to a man's wife[4] or to the clerk of a hotel at which the addressee is a guest is, however, sufficient,[5] and where a telegram is sent to one person in care of another, it is enough to deliver it to the latter without an effort to deliver to the former;[6] and his refusal to receive it, releases the company from liability.[7]

§ 318. **Action May be Brought by Addressee.**— In England, except where the sender is the agent of the addressee, the latter cannot sue the company either for a breach of its contract to transmit the message properly, or for its neglect independent of contract causing him injury.[8] In the United States, on the other hand, either sender or addressee may sue.[9] This conclusion is arrived at in our courts in some cases

1 Julian *v.* Tel. Co., 98 Ind. 327; West. U. Tel. Co. *v.* Fatman, 73 Ga. 285; 54 Am. Rep. 877; West. U. Tel. Co. *v.* Clark, 25 S. W. Rep. 990 (Tex.); West. U. Tel. Co. *v.* Linn, 28 S. W. Rep. 234 (Tex.).

2 Pope *v.* Tel. Co., 14 Ill. (App.) 531. And it is no defense that the sender might have sent it sooner. *Id.*

3 Pope *v.* Tel. Co., 9 Ill. (App.) 283; West. U. Tel. Co. *v.* Cooper, 71 Tex. 507; 10 Am. St. Rep. 772; 9 S. W. Rep. 598.

4 West. U. Tel. Co. *v.* Trissal, 98 Ind. 566.

5 Given *v.* Tel. Co., 24 Fed. Rep. 119.

6 West. U. Tel. Co. *v.* Terrell, 10 S. W. Rep. 70 (Tex.).

7 West. U. Tel. Co. *v.* Young, 77 Tex. 245; 13 S. W. Rep. 998; West. U. Tel. Co. *v.* Thompson, 31 S. W. Rep. 318 (Tex.).

8 Dickson *v.* Tel. Co., 2 C. P. Div. 62; 3 C. P. Div. 1; Playford *v.* Tel. Co., L. R. 4 Q. B. 706; 10 B. & S. 759.

9 New York etc. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; 78 Am. Dec. 338; Elwood *v.* Tel. Co., 45 N. Y. 549; 6 Am. Rep. 140; Wolfskihl *v.* Tel. Co., 46 Hun. 542; Rose *v.* Tel. Co., 6 Robt. 305; West. U. Tel. Co. *v.* Carew, 15 Mich. 525; Aiken *v.* Tel. Co., 5 S. C. 358; West. U. Tel. Co. *v.* Hope, 11 Ill. (App.) 289; Harris *v.* Tel. Co., 9 Phila. 88; West. U. Tel. Co. *v.* Fenton, 52 Ind. 1; Markel *v.* Tel. Co., 19 Mo. (App.) 800; West. U. Tel. Co. *v.* Allen, 66 Miss. 549; 6 South. Rep. 465; West. U. Tel. Co. *v.* McKibben, 114 Ind. 511; 14 N. E. Rep. 894; Hadley *v.* Tel. Co., 115 Ind. 191; 15 N. E. Rep. 845; Herron *v.* Tel. Co., 57 N. W. Rep. 696 (Ia.); Mentzer *v.* Tel. Co., 62 N. W. Rep. 1 (Ia.); West. U. Tel. Co. *v.* Richman, 8 Atl. Rep. 171 (Pa.). But under

through the application of the rule that where A makes a contract for the benefit of B, the latter may sue upon it, as being the real party in interest;[1] in others by regarding the company as the agent of both the sender and the receiver;[2] in others by holding the company as a public agent to be under a duty to both sender and receiver, to carry the message, and to do so with fidelity and care.[3]

§ 319. **Limitation of Liability by Contract.**—By an express contract with the sender (or by a notice assented to by him either expressly or impliedly), a telegraph company may limit its liability to some extent.[4] But for reasons of public policy similar to those

a statute imposing a penalty upon telegraph companies for failure to transmit a message, to be recovered by the person whose dispatch is postponed or neglected, the sender is the person to sue: West. U. Tel. Co. *v.* Pendleton, 95 Ind. 12; 48 Am. Rep. 692.

1 Laws. Contr., § 113. West *v.* Tel. Co., 39 Kas. 93; 7 Am. St. Rep. 530; 17 Pac. Rep. 807; West. U. Tel. Co. *v.* Longwill, 21 Pac. Rep. 339; Wadsworth *v.* Tel. Co., 86 Tenn. 695; 6 Am. St. Rep. 864; 8 S. W. Rep. 574.

2 New York etc. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; 78 Am. Dec. 338.

3 Wadsworth *v.* Tel. Co., *supra;* Young *v.* Tel. Co., 107 N. C. 370; 11 S. C. Rep. 1044; Elwood *v.* Tel. Co., 45 N. Y. 549; West. U. Tel. Co. *v.* Dubois, 128 Ill. 248; 15 Am. St. Rep. 109; 21 N. E. Rep. 4.

4 Young *v.* Tel. Co., 65 N. Y. 163; Breese *v.* Tel. Co., 48 N. Y. 132; 8 Am. Rep. 526; De Rutte *v.* Tel. Co., 1 Daly, 547; Sweetland *v.* Tel. Co., 27 Iowa, 433; 1 Am. Rep. 285; Manville *v.* Tel. Co., 37 Iowa, 214; 18 Am. Rep. 8; West. U. Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744; West. U. Tel. Co. *v.* Tyler, 74 Ill. 68; 24 Am. Rep. 279; 60 Ill. 421; Passmore *v.* Tel. Co., 78 Pa. St. 238; 9 Phila. 90; Harris *v.* Tel. Co., 9 Phila. 88; Wolf *v.* Tel. Co., 62 Pa. St. 83; 1 Am. Rep. 387; West. U. Tel. Co. *v.* Carew, 15 Mich. 525; Wann *v.* Tel. Co., 37 Mo. 473; 90 Am. Dec. 395; U. S. Tel. Co. *v.* Gildersleeve, 29 Md. 232; 96 Am. Dec. 519; Camp *v.* Tel. Co., 1 Met. (Ky.) 164; 71 Am. Dec. 461; West. U. Tel. Co. *v.* Graham, 1 Col. 230; 9 Am. Rep. 136; Ellis *v.* Tel. Co., 13 Allen, 226; Redpath *v.* Tel. Co., 112 Mass. 71; 17 Am. Rep. 69; Grinnell *v.* Tel. Co., 113 Mass. 299; 18 Am. Rep. 485; Pepper *v.* Tel. Co., 87 Tenn. 554; 10 Am. St. Rep. 699; 11 S. W. Rep. 783. It cannot however by contract evade a statutory liability, penal in its nature, for failure to transmit a message correctly. West. U. Tel. Co. *v.* Adams, 87 Ind. 598; 44 Am. Rep. 776; West. U. Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744. It is laid down in a recent case in Georgia that the statute imposing upon telegraph companies a penalty for default in the transmission or delivery of messages is based upon public policy, and has for its object the quickening of the diligence of these companies in the performance of their duties to the public. With this object in view, it seeks to encourage both the sender and the sendee of messages to sue for the penalty, by offering to the one who shall first sue the whole amount of the recovery. For a company to protect itself against payment of the penalty by a contract with

which refuse to permit a common carrier to escape liability, by a contract with the owner of the goods, for the consequence of his own neglect, or that of his agents or servants, a telegraph company, notwithstanding a special contract limiting its liability, will still be liable for mistakes happening in consequence of its own fault, such as want of ordinary skill on the part of its operatives, or the use of defective instruments, but will not be liable for mistakes occasioned by causes beyond its control, such as atmospheric changes, or the vagaries of electricity, provided these mistakes could not have been avoided by the exercise of ordinary care and skill on the part of the operating agents of the company.[1]

the sender, made at the time of receiving from him the message to be sent, that it will not be liable unless a claim for the penalty is presented to it or its agents, in writing, within 60 days after the message is filed for transmission, would be contrary to the policy of the legislature in enacting the statute, and all such contracts are void and of no effect. Says Lumpkin, J.: "The mere fact that a customer voluntarily uses such a blank without objection is of no consequence. As he could not be compelled to use it, his so doing is really without consideration, so far as he is concerned, and is not binding upon him. Besides, this is not a matter for contractual negotiations between the parties. In Telegraph Co. *v.* Taylor, 84 Ga. 408, 1 S. E. 396, it was said that 'the penalty is for the wrongful, violation of a public duty, and neither in whole nor in part for a mere breach of contract;' and this conclusion is borne out by the reasoning of Chief Justice Bleckley on pages 413, 414, 84 Ga., and page 396, 11 S. E. Rep. and the authorities there cited. We have not the slightest idea that in enacting the statute now under consideration the general assembly ever supposed or intended that a telegraph company would be able to protect itself against the payment of a penalty in the manner here attempted. On the contrary, we feel certain that to allow this to be done would be violative of the legislative policy, and, in a large measure, would defeat the purpose for which the statute was passed." Mathis *v.* West. U. Tel. Co., 21 S. E. Rep. 564; Walker *v.* West. U. Tel. Co., *Id.* 565.

1 Fowler *v.* West. U. Tel. Co., 80 Me. 381; 6 Am. St. Rep. 211; 15 Atl. Rep. 29; Ellis *v.* Am. Tel. Co., 13 Allen, 226; Hubbard *v.* West. U. Tel. Co., 33 Wis. 558; 14 Am. Rep. 775; West. U. Tel. Co. *v.* Fontaine, 58 Ga. 433; Wann *v.* Tel. Co., 37 Mo. 472; 1 Am. Dec. 335; Dorgan *v.* Tel. Co., 1 Am. L. T. 406; Bartlett *v.* Tel. Co., 62 Me. 209; 16 Am. Rep. 437; Tel. Co. *v.* Griswold, 37 Ohio St. 301; 41 Am. Rep. 500; White *v.* Tel. Co., 14 Fed. Rep. 710; Ayer *v.* W. U. Tel. Co., 79 Me. 493; 1 Am. St. Rep. 353; 10 Atl. Rep. 495; Smith *v.* Tel. Co., 83 Ky. 104; 4 Am. St. Rep. 126; Harkness *v.* Tel. Co., 73 Iowa, 190; 5 Am. St. Rep. 672; 34 N. W. Rep. 81; West. U. Tel. Co. *v.* Crall, 38 Kan. 679; 5 Am. St. Rep. 795; 17 Pac. Rep. 309; Sweetland *v.* Tel. Co., 27 Iowa, 433; 1 Am. Rep. 285; Manville *v.* Tel. Co., 37 Iowa, 214; 18 Am. Rep. 8; Passmore *v.* Tel. Co., 78 Pa. St. 238; 9 Phila. 88; Candee *v.* Tel. Co., 34 Wis. 471; 17 Am. Rep. 453; West. U. Tel. Co. *v.* Tyler, 74 Ill. 168; 24 Am. Rep. 279; 60 Ill. 421; Aiken *v.* Tel. Co., 5 S. C. 358; West. U. Tel. Co. *v.* Graham, 1 Col. 230;

It is generally held that where the sender of a message uses, without dissent, a blank furnished by the company, on which to write it, he is presumed to assent to the conditions which are printed on its face,[1] and that he will not be permitted to show that he neither read, understood, or assented to them.[2] But if the regulations of the company which seek to limit its liability are not printed on the paper which he uses, there must be evidence of his knowledge of them in order to bind him.[3]

The receiver is not bound by the notices on the blank which the sender uses, though the latter may be.[4]

§ 320. **Conditions Contained in Telegraph Blanks.**—A condition that if the message is not re-

9 Am. Rep. 136; West. U. Tel. Co. *v.* Short, 53 Ark. 434; 14 S. W. Rep. 649; West. Union Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744; True *v.* Tel. Co., 60 Me. 19; 11 Am. Rep. 156; Breese *v.* Tel. Co., 48 N. Y. 132; 8 Am. Rep. 526; Redpath *v.* Tel. Co., 112 Mass. 71; 17 Am. Rep. 69; Grinnell *v.* Tel. Co., 113 Mass. 299; 18 Am. Rep. 485; West. U. Tel. Co. *v.* Way, 83 Ala. 542; 4 South. Rep. 844; Sherrill *v.* Tel. Co., 21 S. E. Rep. 429 (N.C.). A condition exempting the company from liability for errors, delays, or omissions "arising from whatever cause" is unreasonable. Fowler *v.* Tel. Co., 80 Me. 381; 6 Am. St. Rep. 211; 15 Atl. Rep. 29.

1 West. U. Tel. Co. *v.* Carew, 15 Mich. 525; De Rutte *v.* Tel. Co., 1 Daly, 547; 30 How. Pr. 403; Womack *v.* Tel. Co., 58 Tex. 176; 44 Am. Rep. 614; West. U. Tel. Co. *v.* Dunfield, 11 Col. 335; West. U. Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744.

2 Grinnell *v.* Tel. Co., 113 Mass. 299; 18 Am. Rep. 485; Redpath *v.* Tel. Co., 112 Mass. 71; 17 Am. Rep. 69; Breese *v.* Tel. Co., 48 N. Y. 132; 45 Barb. 174; 8 Am. Rep. 526; Young *v.* Tel. Co., 65 N. Y. 163; Wolf *v.* Tel. Co., 62 Pa. St. 83; 1 Am. Rep. 387; West. U. Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744; U. S. Tel. Co. *v.* Gildersleeve, 29 Md. 222; 96 Am. Dec. 579. In Illinois, by analogy to the rule in that state as to terms in bills of lading given by carriers (see *ante* § 148), the above is only evidence of assent but not conclusive. Tyler *v.* Tel. Co., 60 Ill. 421.

3 Thomp. Electr. 212 (criticising the Maryland cases of Binney *v.* Tel. Co., 18 Md. 341; 81 Am. Dec. 607 and U. S. Tel. Co. *v.* Gildersleeve, 29 Md. 232; 96 Am. Dec. 569); De Rutte *v.* Tel. Co., 1 Daly, 547; 30 How. Pr. 403; Beasley *v.* Tel. Co., 39 Fed. Rep. 181; Pearsall *v.* Tel. Co., 44 Hun. 532; 26 N. E. Rep. 534; West. U. Tel. Co. *v.* O'Keefe, 29 S. W. Rep. 1137; (Tex.). But as in the case of the common carrier the reasonable regulations by a telegraph company for the management of its business are binding on its patrons, though they have no knowledge of their adoption. West. U. Tel. Co. *v.* McMillan, 50 S. W. Rep. 298 (Tex.).

4 New York etc. R. Co. *v.* Dryburg, 35 Pa. St. 298; 78 Am. Dec. 338; West. U. Tel. Co. *v.* Fenton, 52 Ind. 1; West. U. Tel. Co. *v.* Richman, 8 Atl. Rep. 171 (Pa.); Lagrange *v.* Tel. Co., 25 La. Ann. 383; Harris *v.* Tel. Co. 9 Phila. 88. But see West. U. Tel. Co. *v.* McKibben, 114 Ind. 511; 14 N. E. Rep. 894; Findlay *v.* Tel. Co., 64 Fed. Rep. 459; Manier *v.* Tel. Co., 29 S. W. Rep. 732 (Tenn.).

peated — for which an extra charge is asked — the company shall not be liable beyond a certain sum, protects the company whenever the mistake is not the result of the negligence of the company or its agents or servants.[1] This is laid down in a number of cases, but as has been pointed out in a recent case in the Supreme Court of the United States,[2] such a construction of conditions of this character would seem to be meaningless, unless it is assumed that telegraph companies are subject to the liability of common carriers, which the courts admit they are not; otherwise it allows to the stipulation no effect whatever; for, if they are not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control. The most effect such an agreement can have, is to shift the burden of proof, and if the party has not required the message to be repeated to prevent any recovery upon proof only that the message did not reach its destination,[3] or that there was an error in the dispatch when it was received by the addressee.[4] In some courts, however, an error in transmitting being proved, the onus is

1 Sprague *v.* Tel. Co., 6 Daly, 200; 67 N. Y. 590; Baldwin *v.* Tel. Co., 45 Barb. 505; 1 Lans. 126; 6 Abb. Pr., N. S., 195; 45 N.Y. 744; 6 Am. Rep. 165; Bryant *v.* Tel. Co., 1 Daly, 575; New York etc. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; 78 Am. Dec. 338; 3 Phila. 408; Dorgan *v.* Tel. Co., 1 Am. L. T. 406; True *v.* Tel. Co., 60 Me. 9; 11 Am. Rep. 156; Binney *v.* Tel. Co., 18 Md. 341; West. U. Tel Co. *v.* Graham, 1 Col. 230; 9 Am. Rep. 136; Manville *v.* Tel. Co. 37 Iowa 214; 18 Am. Rep. 8; Wann *v.* Tel. Co., 37 Mo. 472; 90 Am. Dec. 395; Pegram *v.* Tel. Co., 97 N. C. 57; West. U. Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744; Thompson *v.* Tel. Co., 64 Wis. 531; 54 Am. Rep. 644; West. U. Tel. Co. *v.* Harris, 19 Ill. App. 347; Schwartz *v.* Tel. Co., 18 Hun. 157; Becker *v.* Tel Co., 11 Neb. 87; 38 Am. Rep. 356; West. U. Tel. Co. *v.* Shotter, 18 Cent. L. J. 230 (Ga.)

2 Primrose *v.* Tel. Co., 154 U. S. 1; 14 S. C. Rep. 1098.

3 Kiley *v.* Tel. Co., 109 N. Y. 231; 16 N. E. Rep. 75; Clement *v.* Tel. Co., 137 Mass. 463.

4 Becker *v.* Tel. Co., 11 Neb. 87; 38 Am. Rep. 316; 7 N. W. Rep. 868; Hart *v.* Tel. Co., 66 Cal. 579; 56 Am. Rep. 119; 6 Pac. Rep. 137; Sweetland *v.* Tel. Co., 27 Ia. 433; Womack *v.* Tel. Co., 58 Tex. 176; 44 Am. Rep. 614.

upon the company of proving that it arose from a cause beyond its control.[1]

But negligence of the telegraph company or its agents being shown, such a condition, it is laid down in a great number of cases, is no defense.[2] As well put in a Georgia case:[3] "Any rule or regulation of the company which seeks to relieve it from performing its duty belonging to the employment, with integrity, skill and diligence, contravenes public policy as well as the law, and under it, the party at fault cannot seek refuge. If it becomes necessary for the company, in transmitting messages with integrity, skill and diligence to secure accuracy, to have said messages repeated, then the law devolves upon them that duty to meet its requirements." In *Gillis* v. *Western Union Tel. Co.*,[4] it is said: "The question is, whether it is just and reasonable and consistent with public policy, that telegraph companies should be allowed to stipulate for immunity from liability for their own and their servants' negligence. The Supreme Court of the United States holds that common carriers cannot lawfully stipulate for exemption from liability when such exemption is not just and reasonable in the eye of the law; that it is not just and reasonable in the eye of

1 West. U. Tel. Co. *v.* Tyler, 60 Ill. 421; 14 Am. Rep. 38; 74 Ill. 168; 24 Am. Rep. 279; Bartlett *v.* Tel. Co., 62 Me. 209; 16 Am. Rep. 437. This view is approved in Thomp. on Electr. § 232.

2 West. U. Tel. Co. *v.* Blanchard, 68 Ga. 299; 45 Am. Rep. 480; West. U. Tel. Co. *v.* Graham, 1 Colo. 230; 9 Am. Rep. 136; Binney *v.* Tel. Co., 18 Md. 341; 81 Am. Dec. 607; Sweetland *v.* Tel. Co. 27 Ia. 433; Marr *v.* Tel. Co., 85 Tenn. 529; 3 S. W. Rep. 496; Pepper *v.* Tel. Co. 87 Tenn. 554; 11 S. W. Rep. 783; Thompson *v.* Tel. Co., 64 Wis. 531: 25 N. W. Rep. 789; West. U. Tel. Co. *v.* Tyler, 74 Ill. 168; Ayer *v.* Tel. Co., 79 Me. 493; 1 Am. St. Rep. 353; 10 Atl. Rep. 495; Tyler *v.* Tel. Co., 60 Ill. 421; 14 Am. Rep. 38; West. U. Tel. Co. *v.* Tyler, 74 Ill. 168; 24 Am. Rep. 279; West. U. Tel. Co. *v.* Short, 53 Ark. 434; 14 S. W. Rep. 649; West. U. Tel. Co. *v.* Cook, 61 Fed. Rep. 625; Gillis *v.* Tel. Co., 61 Vt. 461; 17 Atl. Rep. 736 (Vt.). Some Courts lay it down that the negligence of the company must be *gross* to make it liable under such a condition. See Thomp. Electr., § 223 *et seq.* Redpath *v.* Tel. Co., 112 Mass. 71; 17 Am. Rep. 69; Birkett *v.* Tel. Co., 61 N.W. Rep. 645 (Mich.); Primrose *v.* Tel. Co., 154 U. S. 1; 14 S. C. 1098. Fuller, C. J., and Mr. Justice Harlan dissenting.

3 West. U. Tel. Co. *v.* Blanchard, *supra.*

4 61 Vt. 461; 17 Atl. Rep.

the law for them to stipulate for exemption from liability for the negligence of themselves or their servants; and that these rules apply to carriers of goods and to carriers of passengers for hire, and with special force to the latter.[1] * * * This case agrees with the general rule on the subject. While courts differ widely as to whether telegraph companies can lawfully stipulate to any extent against liability for negligence, none appear to have gone the length of holding that they can properly stipulate against liability for gross negligence, as they call it. But many of the cases hold that regulations like the one in question, as to non-liability in respect of unrepeated messages and similar regulations, are reasonable precautions for telegraph companies to take, and are binding upon all who assent to them, so as to exempt the company from liability beyond the amount stipulated, for any cause except gross negligence or willful misconduct on its part. Such a regulation, it is said, does not undertake wholly to exempt the company from liability for loss, but merely requires the other party to the contract, if he considers the transmission and delivery of the message of such importance to him that he intends to hold the company responsible in damages beyond the amount paid for the message for non-fulfillment of the contract on its part, to increase the payment by one-half; and that even common carriers have a right to inquire as to the quality and value of the goods and packages intrusted to them for carriage, and are not liable for goods of unusual value, if false answers are made to their inquiries. In some cases, gross negligence seems to be used to define a degree of carelessness greater than that involved in ordinary negligence, and one of

[1] Railroad Co. *v.* Lockwood, 17 Wall. 357.

which the law takes distinct cognizance as an independent ground of liability. It may well be doubted whether there is any difference in law, between negligence and gross negligence. The tendency of judicial opinion, is to deny it. But, however that may be, we are not prepared to follow this line of cases. As this is the first time this question has ever been before this court for decision, we are at liberty to adopt the view we regard as most just and reasonable, and the most consistent with sound public policy; and when we consider the relation of telegraph companies to the public, the character and extent of their business, and the duties and obligations incident thereto, we see no sufficient reason for distinguishing between ordinary and gross negligence in this behalf, and think it most just and reasonable, and most consistent with sound public policy, that they be not allowed to stipulate against liability for negligence of any kind, if there be more than one kind. Telegraph companies do not deal with employers on equal terms. There is a necessity for their employment. They are created to promote public convenience; and until the introduction of the telephone they were, and practically still are, especially for considerable distances, without competition, save among themselves, in the transmission of intelligence by electricity. Their business has increased to vast proportions, and neither the commercial world nor the general public can dispense with their services. It is, therefore, just and reasonable that they should not be allowed to take advantage of their situation, and of the necessities of the public, to exact exemption from that measure of duty that the law imposes upon them, and that public policy demands. A former eminent chief justice of this court, in his collection of American Railway Cases, says that

'every attempt of carriers, by general notice or special contract, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and therefore based upon principles and a policy which the law will not uphold."[1] This doctrine is equally applicable to telegraph companies. In the recent case of *Smith* v. *Telegraph Co.*,[2] it is said that telegraph companies are public agents, engaged in a *quasi* public business; that care and fidelity are essential to their character as public servants, which public policy forbids that they should abdicate as to the public by a contract with an individual, who is but one of millions whose business will not, perhaps, admit either delay or contest in the courts, but who are compelled to submit to any terms that the company may impose, and that the law should not uphold a contract by which public agents seek to shelter themselves from the consequences of their own wrong and neglect; that the liability of telegraph companies is not founded wholly upon contract; that they are chartered for public purposes, extraordinary powers conferred upon them, the right of eminent domain given to them, and that if they did not serve the public they could not, constitutionally string wire over a man's land without his consent; wherefore they are obliged to receive and transmit messages, and are liable for negligence without any express contract, and that, if they rely upon a contract or a notice to restrict liability, it must be one not in violation of public policy; that, in view of the vast interests committed to them, the extraordinary powers conferred upon them, and the virtual monopoly they enjoy, courts should compel them, *nolens volens*,

[1] Redf. Amer. Ry. Cas. 227. [2] 83 Ky. 104.

to perform the corresponding duties of diligence and good faith to the public thereby created; that any other rule would defeat the very purpose for which the companies are chartered, namely, the accurate and speedy transmission of messages for the public; that while they may restrict their liability to a reasonable extent, they cannot to the extent of immunity from the consequences of their own negligence; that they must bring to the discharge of their duties that degree of care and skill that careful and prudent men exercise in like circumstances; and that any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non-performance, is forbidden by the demands of sound public policy; and that to hold otherwise, would arm them with very dangerous power, and leave the public comparatively remediless. This reasoning is entirely satisfactory to us, and we adopt it as our own."

Certainly, when the repetition of the message would not have prevented the damage complained of, the company should not be protected from liability by reason of the failure to have it repeated, as for example, where the message is never sent at all, or negligently delayed, or not delivered at all.[1] And it is clear that a telegraph company would not be allowed, by stipulations on its message blanks against liability for delays in transmitting unrepeated messages, arising from the negligence of its servants, or from unavoidable interruptions in the working of its lines, to relieve itself

1 Thomp. Electr., § 228. West. U. Tel. Co. *v.* Graham, 1 Colo. 230; 9 Am. Rep. 136; True *v.* Tel. Co., 60 Me. 9; Gulf etc. R. Co. *v.* Wilson, 69 Tex. 739; 7 S. W. Rep. 653; West. U. Tel. Co. *v.* Fenton, 52 Ind. 1; Baldwin *v.* Tel. Co., 54 Barb. 505; West. U. Tel. Co. *v.* Henderson, 89 Ala. 510; 7 South. Rep. 419; West U. Tel. Co. *v.* Broesche, 72 Tex. 604; 10 S. W. Rep. 734; West. U. Tel. Co. *v.* Way 83 Ala. 542; 4 South. Rep. 844; Birney *v.* Tel. Co., 18 Md. 341; 81 Am. Dec. 607; Bryant *v.* Tel. Co., 1 Daly 575; Sprague *v.* Tel. Co. 6 Daly 200; West. U. Tel. Co. *v.* Barrow, 30 S. W. Rep. 378.

from liability in a case where it receives a message with full information of its great importance and the necessity for immediate transmission, knowing at the time that its lines were then down, but neither informing the sender thereof, so as to give him an opportunity to send by another line, nor itself attempting to transmit the dispatch by such other line. In such a case, the conduct of the company operates as a fraud upon the sender; and it cannot therefore be allowed, by any stipulations in its blanks, to reduce the right of recovery to the price of transmission, but it is liable for the full damages occasioned.[1] The courts are, in short, inclined to give but little benefit to the company from the use of such conditions, perhaps for the reason that they are, in most cases, as said by a learned writer on this subject,[2] a mere sham, their design being to take advantage of a condition which they know will scarcely ever be performed, because the object of resorting to the telegraph being to secure expedition in making communications, this fact will operate to deter a customer in haste to have a message delivered, from ordering it to be repeated.[3]

Conditions have been sustained by the courts requiring claims to be presented within a certain number of days,[4] provided the time given be reasonable;[5] for the

[1] Pacific Post. Tel. Co. *v.* Fleischer, 55 Fed. Rep. 738; 66 Id. 898.

[2] Thomp. Electr., § 241.

[3] "It is speaking within carefully chosen bounds to say that most of the judicial courts in upholding the stipulation as reasonable fell into the trap with shameful alacrity." Thomp. Electr. § 241.

[4] Young *v.* Tel. Co., 65 N. Y. 163; Wolf *v.* Tel. Co., 62 Pa. St. 83; 1 Am. Rep. 387; West. U. Tel. Co. *v* Jones, 95 Ind. 228; 48 Am. Rep. 713; West. U. Tel. Co. *v.* Meredith, 95 Ind. 93; Aiken *v.* Tel. Co., 5 S. C. 358; Heiman *v.* Tel. Co. 57 Wis. 562; 16 N. W. Rep. 32; Massengale *v.* Tel. Co., 17 Mo. App. 257; Cole *v.* Tel. Co., 33 Minn. 227; 22 N. W. Rep. 385; West. U. Tel. Co. *v.* Dunfield, 11 Col. 335; 18 Pac. Rep. 34; West. U. Tel. Co. *v.* Rains, 63 Tex. 27; Hill *v.* Tel. Co., 11 S. E. Rep. 874; West. U. Tel. Co. *v.* Ferguson, 27 S. W. Rep. 1048 (Tex.).

[5] Johnson *v.* Tel. Co., 33 Fed. Rep. 362; Beasley *v.* Tel. Co., 39 Fed. Rep. 181; Johnson *v.* Tel. Co., 33 Fed. Rep. 362; Conrad *v.* Tel. Co., 29 Atl. Rep. 888 (Pa.); West. U. Tel. Co. *v.* Phillips, 30 S. W. Rep. 494 (Tex.).

same reasons which sustain such conditions in the case of common carriers.[1] So, a rule is reasonable that a message requiring an answer, or to be delivered beyond certain limits, shall be accompanied by a deposit to pay for it,[2] but neither by rule or contract can it relieve itself from liability for a statutory penalty,[3] nor for neglect,[4] either in day messages or half rate night messages;[5] nor can it thus limit its liability to the cost of the message.[6]

§ 321. **Connecting Lines.**—By statute in most, if not all of the States, it is incumbent upon telegraph companies to receive and transmit the dispatches of other companies, as well as of the public generally.[7] and, like a common carrier, a telegraph company is not ordinarily liable for the defaults of connecting lines.[8] It may, however, assume a through liability by contract and by the first company accepting a message directed to a place beyond its lines, and receiving payment for

1 *Ante* § 158. It is held generally that such a condition does not apply to actions to recover a statutory penalty for neglect to transmit or delay in delivery. West. U. Tel. Co. *v.* Cobbs, 47 Ark. 344; 58 Am. Rep. 756; 1 S. W. Rep. 558; West. U. Tel. Co. *v.* Cooledge, 12 S. E. Rep. 264. A stipulation on a telegraph blank that the company would not be liable unless claims were presented within 60 days is in violation of the statute of Nebraska, expressly providing that the company shall not be relieved from liability for non-delivery of telegrams, or for mistakes in transmission, by reason of any clause, condition, or agreement contained in its printed blanks. West. U. Tel. Co. *v.* Kemp, 62 N. W. Rep. 451.

2 Hewlett *v.* Tel. Co., 28 Fed. Rep. 181; West. U. Tel. Co. *v.* McGuire, 104 Ind. 130; 54 Am. Rep. 296; 2 N. E. Rep. 201; West. U. Tel. Co. *v.* Henderson, 89 Ala. 510; 7 South. Rep. 419. A regulation requiring the sender to pay in advance charges for the delivery of the message in case the addressee lives beyond its free delivery limits, irrespective of whether the sender knows the distance of the addressee's residence from the station, is unreasonable and invalid. West. U. Tel. Co. *v.* Moore, 39 N. E. Rep. 874 (Ind.).

3 West. U. Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744; West. U. Tel. Co. *v.* Meek, 49 Ind. 53; West. U. Tel. Co. *v.* Adams, 87 Ind. 598; 44 Am. Rep. 76; West. U. Tel. Co. *v.* Young, 93 Ind. 168.

4 See *ante*, § 319.

5 Thomp. Electr., § 201.

6 Thomp. Electr., § 193. Fowler *v.* Tel. Co., 80 Me. 381; 6 Am. St. Rep. 211; 15 Atl. Rep. 29; True *v.* Tel. Co., 60 Me. 9; 11 Am. Rep. 156; Gillis *v.* Tel. Co., 61 Vt. 461.

7 Thomp. Electr., §§ 158, 261.

8 *Id.*, § 262. Baldwin *v.* Tel. Co., 45 N. Y. 744; 6 Am. Rep. 165; Leonard *v.* Tel. Co., 41 N. Y. 544.

the extra service, it becomes liable for the negligence of any connecting lines; for they are its agents in the service, and not the sender's.[1] The first company may, by special contract with the sender, limit its liability to defaults occurring upon its own line, and protect itself against any loss occasioned by the negligence of the connecting company.[2] If the connecting company is sued, it cannot avail itself of the terms and conditions in the blank limiting the liability of the first company.[3]

§ 322. **Contributory Negligence of Sender.**— Where the loss is traceable to the negligence of the sender—as for example where he gives the wrong address,[4] or writes the telegram so indistinctly that its meaning is easily mistaken[5] — it will bar the plaintiff's action. But in a Pennsylvania case,[6] a message which was handed to the operator, ordering of a florist two hand bouquets, was sent by him as an "order for two hundred bouquets." It was shown in defense, that the last word was so badly written that it appeared to be "hund" and not "hand." The court said: "If the handwriting was so bad that he could not read it correctly, he should not have undertaken to transmit it; but the business of transmission assumed, it was very plainly his duty to send what was written. It was no affair of his that the message would have been insensible. Messages

1 De Rutte *v.* Tel. Co., 1 Daly, 547; Baldwin *v.* Tel. Co., 1 Lans. 125; 54 Barb. 505; Bank of New Orleans *v.* Tel. Co., 27 La. Ann. 49; Turner *v.* Tel. Co., 41 Ia. 458; 20 Am. Rep. 605.

2 West. U. Tel. Co. *v.* Munford, 87 Tenn. 190; 10 Am. St. Rep. 630; 10 S. W. Rep. 318; West. U. Tel. Co. *v.* Carew, 15 Mich. 525.

3 Squire *v.* Tel. Co., 98 Mass. 232; 93 Am. Dec. 157.

4 Deslottes *v.* Tel. Co., 40 La. Ann. 183; 3 South. Rep. 566; West. U. Tel. Co. *v.* McDaniel, 103 Ind. 294; 2 N. E. Rep. 709. West. U. Tel. Co. *v.* Foster, 64 Tex. 220; 53 Am. Rep. 754.

5 Koons *v.* Tel. Co., 102 Pa. St. 164.

6 New York etc. Tel. Co. *v.* Dreyburg, 35 Pa. St. 298; 78 Am. Dec. 338.

are often sent along the wires that are unintelligible to the operator. When he presumed to translate the handwriting and to add letters which confessedly were not in it, he made the company responsible to (the receiver), for the damages which resulted from his wrongdoing." So, though the sender gives no street number with the address, if he is not asked for it, this will be no answer to a suit for damages for delay.[1]

§ 323. **Telephone Companies.** —The same general rules which apply to the telegraph apply likewise to the telephone. Within two years after the first telephone line had begun business in Great Britain, the courts of that country decided that a conversation through a telephone was a "telegram," and that the telephone business came within the British statute, giving to the Postmaster-General the exclusive control of the transmission of messages by telegraph.[2] It is also well settled in the United States, that a telephone company is a "telegraph company," within those words, where found in a statute.[3] In so far, then, as it has undertaken to supply a public demand beyond that undertaken by the telegraph company, it has become a public carrier of news, subject to control by the State in the regulation of its charges and otherwise;[4] obligated to

[1] West. U. Tel. Co. *v.* Smith, 21 S. E. Rep. 166 (Ga.).

[2] Atty. Gen. *v.* Edison Tel. Co., 6 Q. B. Div. 244.

[3] Chesapeake etc. Telephone Co. *v.* Balt. etc. Telephone Co., 66 Md. 397; 59 Am. Rep. 167; 7 Atl. Rep. 809; Franklin *v.* Northwestern Telephone Co., 69 Iowa, 97; 28 N. W. Rep. 461; Iowa Union Telephone Co. *v.* Board of Equalization, 67 Iowa, 250; 25 N. W. Rep. 155; Attorney-General *v.* Edison Telephone Co., L. R. 6 Q. B. Div. 244; Wis. Telephone Co. *v.* Oskosh, 62 Wis. 36; 21 N. W. Rep. 828; Bell Telephone Co. *v.* Com., 59 Am. Rep. 172.

[4] Cent. Union Telephone Co. *v.* Falley, 118 Ind. 194; 10 Am. St. Rep. 114; 19 N. E. Rep. 604; Cent. Union Tel. Co. *v.* Bradbury, 106 Ind. 1; 5 N. E. Rep. 721. As to the right of a municipality to regulate telephone charges see City of St. Louis *v.* Bell Tel. Co., 96 Mo. 623; 9 Am. St. Rep. 370; 10 S. W. Rep. 197. The fact that telephones are patented, is immaterial; and so is the fact that its lines extend beyond the state. Hockett *v.* State, 105 Ind. 250; 55 Am. Rep. 201; 25 N. E. Rep. 178; Cent. U. Tel. Co. *v.* Falley, 118 Ind. 194; 10 Am. St. Rep. 114; 19 N. E. Rep. 604. It cannot avoid a statute regulating its charges

supply to any individual or corporation, instruments and connections with its exchanges, and it cannot, therefore, refuse its instruments and the use of its lines to persons desiring them,[1] nor has it a right to discriminate between different telegraph companies.[2]

It may, however, establish reasonable regulations in the conduct of its business, and deny to persons not complying with its rules, the right to use its instruments. A regulation is reasonable that persons using the instruments shall conduct their conversations in a becoming manner, free from obscenity or profanity;[3] that a subscriber shall not use his instrument in transmitting messages for a rival company.[4] But a regulation is unreasonable and invalid which prohibits subscribers from calling a messenger otherwise than through the central office.[5]

§ 324. **Sleeping Car Companies—Public Agencies but not Common Carriers.**—Like other public agencies, the sleeping car company is subject to public regulation and control, and bound to treat all persons whose patronage it solicits, without discrimination—

by changing its rental plan and charging for each conversation, or by removing the instruments from houses and offices of subscribers, and establishing public telephone stations, and then charging for each separate use of the telephone. Cent. U. Tel. Co. *v.* Falley, 118 Ind. 194; 10 Am. St. Rep. 114; 19 N. E. Rep. 604.

1 State *v.* Tel. Co., 36 Ohio St. 206; 38 Am. Rep. 583; State *v.* Nebraska Telephone Co., 19 Neb. 126; 52 Am. Rep. 404; 22 N. W. Rep. 237; Bell Telephone Co. *v.* Balt. etc. Telephone Co., 59 Am. Rep. 172, note; State *v.* Bell Telephone Co., 10 Cent. L. J. 438; 11 Cent. L. J. 357; Louisville Trans. Co. *v.* Am. Dist. Telephone Co., 14 Chic. L. N. 15. The right of the individual is enforceable by *mandamus*. State *v.* Neb. Telephone Co., 17 Neb. 126; 52 Am. Rep. 504; 22 N. W. Rep. 237; Cent. Union Telephone Co. *v.* Falley, 118 Ind. 184; 10 Am. St. Rep. 114; 19 N. E. Rep. 604; State *v.* Bell Telephone Co., 10 Cent. L. J. 438; 11 Cent. L. J. 359; State *v.* Bell Telephone Co., 23 Fed. Rep. 539; Bell Telephone Co. *v.* Com., 35 Alb. L. J. 4; 59 Am. Rep. 172; Louisville Trans. Co. *v.* Am. Dist. Tel. Co., 24 Alb. L. J. 283.

2 State *v.* Tel. Co., 36 Ohio St. 296; 38 Am. Rep. 583; Com. Union Tel. Co. *v.* New England Tel. Co., Vt. 1889; State *v.* Bell Telephone Co., 23 Fed. Rep. See Am. Rapid Tel. Co. *v.* Conn. Tel. Co., 49 Conn. 352; 44 Am. Rep. 237.

3 Pugh *v.* Tel. Co., 27 Alb. L. J. 162.

4 People *v.* Hudson River Telephone Co., 19 Abb. N. C. 466.

5 People *v.* Hudson River Tel. Co., 19 Abb. N. C. 466.

in other words, it is bound to carry all persons who, under its reasonable rules, apply for its peculiar form of transportation.[1] It does not, however, undertake the duty—as a common carrier does—of transporting the passenger to his destination. That duty is assumed by the railroad company, and for any breach of contract in this respect, or for any injury which the passenger may receive, and which is connected with the moving of the train, he must look to the railroad company, for the sleeping car company is not responsible for the negligence or misconduct of the employes of the railroad, charged with the duty of operating the train of which the sleeping car is a part.[2] The sleeping car company may refuse to sell a person a berth where all have been sold even though a single passenger may have purchased more than one—as for example, a section containing two berths.[3] And a reasonable latitude must be given the company in the making up of berths and fixing the time and order of doing so, and a person who has purchased a berth cannot require that his shall be made up at once when according to the rules of the company the orders of passengers either for meals or berths are required to be filled by its employees in the order they are given.[4] And, so far as its responsibility for the baggage and valuables of passengers is concerned, the sleeping car company is not a common carrier, nor subject to the insurance liability of a common carrier.[5]

1 Nevin *v.* Pull. Pal. Car Co., 106 Ill. 222; 46 Am. Rep. 688; Pull. Pal. Car Co. *v.* Taylor, 65 Ind. 153; 32 Am. Rep. 57.

2 Duval *v.* Pull. Pal. Car Co., 62 Fed. Rep. 265; Campbell *v.* Pull. Pal. Car Co., 42 Fed. Rep. 484; Bliss *v.* Pull. Pal. Car Co., 16 Chic. L. N. 338.

3 Searles *v.* Mann Boudoir Car Co., 45 Fed. Rep. 331.

4 Pull. Pal. Car Co. *v.* Ehrman, 4 South. Rep. 113 (Miss.), and see Pull. Pal. Car Co. *v.* Bates, 14 S. W. Rep. 855; 15 *Id.* 786 (Tex.).

5 Blum *v.* South. Pull. Car Co., 3 Cent. L. J. 592; Pullman Pal. Car Co. *v.* Smith, 73 Ill. 360; 24 Am. Rep. 258; Crozier *v.* R. Co., 43 How. Pr. 466; Woodruff Sleeping Car Co. *v.* Diehl, 84 Ind. 474; 43 Am. Rep. 102; Barrott *v.* Pull. Pal. Car Co., 51 Fed. Rep. 796; Pull. Pal. Car Co. *v.* Freudenstein, 34 Pac. Rep. 578 (Colo.).

§ 325. **Not Liable as Innkeepers.**—In a number of cases, it is likewise denied—although the car might well be likened in many respects to a moving inn—that its responsibilities are those of an innkeeper.[1] This view of the status of the sleeping car company dates from a decision rendered in the Federal Court in 1876,[2] where the following seven reasons were given for distinguishing its liability from that of an innkeeper:

1. The peculiar construction of sleeping-cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth, with scarcely a possibility of detection.

2. As a compensation for his extraordinary liability, the inn-keeper has a lien upon the goods of his guests for the price of their entertainment. There is no instance where the proprietor of a sleeping-car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance, does not weaken the argument, as inn-keepers are also entitled to pre-payment.

3. The inn-keeper is obliged to receive every guest who applies for entertainment. The sleeping car re-

[1] Blum *v.* South. Pull. Car Co., *supra;* Diehl *v.* Woodruff, 10 Cent. L. J. 66; Woodruff Sleeping Car Co. *v.* Diehl, 84 Ind. 474; Palmeter *v.* Wagner, 11 Alb. L. J. 149; Welch *v.* Pull. Pal. Car Co., 17 Abb. (N. S.) 352; Bevis *v.* R. Co., 56 Am. Rep. 850; 26 Mo. App. 23; Ill. Cent. R. Co. *v.* Handy, 63 Miss. 607; 56 Am. Rep. 846; Hampton *v.* Pull. Pal. Car Co., 42 Mo. App. 149; Root *v.* Sleeping Car Co., 28 Mo. App. 160; Scaling *v.* Pull. Pal. Car Co., 24 Mo. App. 29; Pull. Pal. Car Co. *v.* Gardner, 16 Am. & Eng. R. R. Cas. 324; Tracy *v.* Pull. Pal. Car Co., 67 How. Pr. 154; Lewis *v.* N. Y. Cent. R. Co., 9 N. E. Rep. 615 (Mass.); Pullman Pal. Car Co. *v.* Pollock, 5 S. W. Rep. 814 (Tex.); Carpenter *v.* R. Co., 124 N. Y. 53; 26 N. E. Rep. 277; Barrott *v.* Pull. Pal. Car Co., 51 Fed. Rep. 796; Pull. Pal. Car Co. *v.* Freudenstein, 34 Pac. Rep. 578 (Colo.).

[2] Blum *v.* South. Pull. Car Co., 1 Flip. 500; 3 Cent. L. J. 591; Fed Cas. 1574.

ceives only first-class passengers traveling upon that particular road.

4. The inn-keeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping car furnishes a bed only, and that, too, usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging.

5. The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail, however, is under no obligation to take a sleeping car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose.

6. The inn-keeper may exclude from his house every one but his own servants and guests. The sleeping car is obliged to admit the employees of the train to collect fares and control its movements.

7. The sleeping car can not even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare, or violation of its rules and regulations.

§ 326. **Contrary View.—Sleeping Car Company Liable as an Innkeeper.**—The arguments made in the Federal case just cited, have been more than once controverted, and the correctness of the reasoning denied; and it is urged:

Though it is true that the several berths are not separate rooms, and therefore the occupants cannot lock the doors and exclude all intruders, yet it has never

been held that an inn-keeper was excused because he was compelled to put two or more guests, strangers to each other, it may be, into the same room. Scarcely a year passes in any city or town, but by reason of some convention or other meeting, the hotels are filled and cots placed in the aisles, which are occupied by guests during the night, yet no landlord would claim exemption for loss upon the ground alone that his house was crowded, or that he did not have a separate room for each guest. Suppose a sleeping car to remain stationary at one point for months or years as a place for the entertainment of travelers, and patronized as such, would the fact that it was a car instead of a house, exempt it from the liabilities of an inn? If so, then a car stationed beside an inn and doing the same business would, without reason, be freed from liability, while the inn-keeper would be held; but the law does not thus discriminate in favor of any one. Suppose the car was stationed at some point and in fact an inn and its proprietor therefore responsible to his guests, would this liability cease because the car was daily moved from place to place? If so, why? And it may be added that many of the sleeping cars now in use in this country, and called "boudoir," or "compartment" cars, are divided into sections, and the occupants of each section may lock its doors just as a guest at an inn may. Will the new style of car require a different application of the law? The argument that thieves might engage one or more berths in a car, and at the first opportunity leave the car carrying what articles they could steal before leaving, would extend as well to the case of the inn-keeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can, and escape, yet no one would contend that the inn-keeper would not be

responsible for the property so stolen, and this, whether it is stolen at night or in the day time, yet in many of the large inns of this country at least, there are numerous doors for ingress and egress, while in a sleeping car there are but two.

It is said that an inn-keeper has a lien upon the traveler's baggage for the amount of his bill, and that no such lien exists in favor of the sleeping car company. This question has not yet been presented to any court for the reason that the sleeping car companies transact all their business by selling tickets for berths or sections, and demand payment in advance. Hotel-keepers do the same in many cases where a doubt exists as to the responsibility of the guest, and no doubt by rule, might require prepayment in every case. There is no occasion for a lien in case of the sleeping car, therefore, and for that reason none so far has been claimed.

It is said that the sleeping car differs from an inn in the character of its guests; that an inn must receive all who apply, while the car can receive none but those who hold first class tickets or other means of transportation, entitling them to ride in first class coaches. But every person, by paying the price of a first class ticket, may become entitled to purchase a ticket and travel in a sleeping car. It is merely a matter of expense. The same rule applies to inns. Thus, the rates at a first class inn, rate from three to five dollars per day, at a second class, about one-half as much, and third class from one-third to one-half of the amount. As well complain that a traveler could not stop at a first class inn for the price charged at a second or third class inn.

To the argument that the sleeping car company supplies a bed only, and not meals, and that, simply for a

specified time, a sufficient answer is that to constitute an inn, it is not now necessary that it should furnish meals to the guests and that it should have accommodations for horses and other animals of travelers.[1] Where meals are served on a sleeping car, as they generally are on the best roads, it could hardly be contended that it differed from an inn in its accommodations. If it is insisted that there is no contract with the hotel-keeper as to the length of time the guest will stay, and in this regard the contract differs from that of the sleeping car company, which is for definite service, the distinction is more technical than real. Suppose a traveler should go to a hotel, and on registering should say to the landlord: "I will stay with you two, three or four days, as the case may be," would he thereby become a mere boarder and not a guest? No one will so contend. He would be there temporarily until his business was completed, and the inn-keeper would be liable to him for any dereliction of duty of himself or employes. Now, suppose a traveler purchases a first class ticket and sleeping car ticket from St. Louis to Chicago, and enters the sleeping car, for the use of which he has paid in advance, will the fact that the contract is to continue until the car arrives at Chicago, some ten or twelve hours thereafter, change the contract from that of the inn-keeper?[2]

§ 327. **This View Sustained in Nebraska.**—In the case of *Pullman Palace Car Co.* v. *Lowe*,[3] this view of the liability of a sleeping car company is sustained, and it is held that it is responsible for the baggage of guests to the same extent as an inn-keeper, Maxwell, J., in

[1] See *ante* § 72.

[2] See article in 27 Am. L. Rev. 24 from which the arguments given above are taken.

[3] 28 Neb. 239; 44 N. W. Rep. 226.

a learned and exhaustive judgment, saying: "It may be well to consider what the company undertakes to perform, and also what it does not undertake. The latter proposition will be considered first. It does not undertake to furnish the railway for its cars to run upon, nor the motive power to propel them, and hence is not entitled to compensation for the ordinary carriage of passengers. It does invite for hire all passengers holding first class tickets to occupy its cars. In effect, it says to all such passengers: 'We will furnish you safe, pleasant, commodious cars, with all possible facilities to prevent weariness and fatigue, with comfortable sleeping accommodations, and the necessary toilet facilities, if you pay the price demanded in addition to the ordinary fare.' The nature of this undertaking is the question for consideration. On the one hand, it is claimed that, so far as the company holds itself out as performing the duties of an innkeeper, so far it should be charged with the strict liability of the same. On the other it is sought to make the liability of the company merely that of a lodging-house-keeper. In the very able and carefully prepared briefs of the attorney for the plaintiff in error, we find the following objections to charging the company with the liability of an inn-keeper. He says: 'It undertakes (1) to furnish accommodations to 'first class' passengers exclusively; (2) to furnish toilet accommodations to such passengers; (3) to furnish a certain specified seat or bed to such a passenger; (4) to furnish a servant who will respond to all proper demands on his service by such passengers, promptly and politely; but to do these four things for a limited time, which is agreed upon between it and each passenger, in advance. It does not make even this agreement with all those who travel by rail. It makes this agreement

with first class passengers exclusively.' The distinction between an inn-keeper and a lodging-house-keeper is set forth in many cases, but is very well drawn in the case of *Cromwell* v. *Stephens*.[1] After quoting the definition of an 'inn,' as given by Oakley, C. J., in *Wintermute* v. *Clark*,[2] to-wit, 'where all who come are received as guests, without any previous agreement as to the duration of their stay or as to the terms of their entertainment;' and from *Willard* v. *Reinhardt*,[3] in which the distinctions between a boarding-house and an inn were declared to be this: 'In a boarding-house, the guest is under an express contract, at a certain rate, for a certain period of time, but in an inn, there is no express engagement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract;' and from *Carpenter* v. *Taylor*,[4] as follows: "Mere eating-houses cannot be considered as inns. They are wanting in some of the requisites necessary to constitute them inns,"—it will be seen that a distinction is attempted to be drawn between the sleeping car company and an inn-keeper, because only a certain class can occupy such cars, viz., persons holding first class tickets, whereas, at an inn, all who conduct themselves properly may be entertained. There is a great confusion in the decisions as to what constitutes an 'inn.' In *Calye's Case*,[5] it was held that inns were instituted for passengers and wayfaring men. In another case, an 'inn' is defined to be a house where the traveler is furnished all he has occasion for, while on the way. *Thompson* v. *Lacy*.[6] Bouvier defines 'inn-keeper' to be 'the keeper of a common inn for the lodgment and en-

1 2 Daly, 15.
2 5 Sandf. 247.
3 2 E. D. Smith, 148.
4 1 Hilt. 195.
5 8 Coke, 32.
6 3 Barn. & Ald., 283.

tertainment of travelers and passengers, their horses and attendants, for a reasonable compensation.' The inn-keeper is bound to take in and receive all travelers and wayfaring persons, and entertain them, if he can accommodate them, and the same is true of a sleeping car company as to all passengers holding a first class ticket. The fact that persons holding second or third-class tickets agree, in effect, in consideration of lower fare, to waive their right to enter a sleeping car, does not enter into the case any more than that of a traveler who, to avoid the expense of an inn, should stop at a private house. In any event, the company which sells sleeping car tickets to all first-class passengers that may pay the price, to that extent stands in the same relation as an inn-keeper who must for hire, entertain those asking for entertainment. A more difficult question is to properly define the word 'guest' at an hotel. Parsons defines a 'guest' to be one who "comes without any bargain for time, remains without one, and may go when he pleases."[1] This is not sufficiently comprehensive to be a proper definition. In *Walling* v. *Potter*,[2] the Supreme Court of Connecticut defines the word 'guest' as follows: "A guest is one who patronizes an inn as such. But it is said that none but a traveler can be a guest at an inn, in a legal sense.' We do not suppose that the court intended, in the definition above quoted, to lay stress upon the word 'traveler.' It is used in a broad sense, to designate those who patronize inns. In *Wintermute* v. *Clark*,[3] the court say that, in order to charge a party as an inn-keeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open; it being sufficient to prove that all who came were re-

1 2 Pars. Cont. 151.
2 35 Conn. 183.
3 5 Sandf. 247.

ceived as guests, without previous agreement as to the time or terms of their stay. A public house of entertainment, for all who chose to visit it, is the definition of an inn. These definitions are really in harmony with each other. Webster defines a traveler as 'one who travels in any way.' Distance is not material. A townsman or neighbor may be a traveler, and therefore, a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the inn-keeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, anyone away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the inn-keeper responsible as such.' This, we think, is a correct definition of the word 'guest,' and we adopt the same.[1] In *Dunbier* v. *Day*,[2] this court held that an inn-keeper was bound to take all possible care for the safety and security of the goods, money, etc., of his guests while in his house. And if the goods or money of a guest be stolen from the inn, through no fault or neglect of the guest, nor by a companion guest, and there is no evidence to show how it was done, or by whom, the inn-keeper is liable for the loss. This, we think, is a correct statement of the law.

"A 'lodger' is defined by Bouvier to be 'one who inhabits a portion of a house of which another has the

1 Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417. In the latter case, the guest made an arrangement as to the price to be paid per week, and it was held that this did not take away his character as a traveler and guest. See also Hall *v.* Pike, 100 Mass. 495; Norcross *v.* Norcross, 53 Me. 163; Pinkerton *v.* Woodward, 33 Cal. 557; and a valuable article in 14 Cent. L. J. 206; Hancock *v.* Rand, 17 Hun, 279.

2 12 Neb. 597; 12 N. W. Rep. 109.

general possession and custody.' There is some confusion in the decisions, arising mainly from the want of a clear definition of what constitutes a 'guest' as distinguished from a mere 'lodger.' Generally, however, a lodger is one who, for the time being, has his home at his lodging place.[1] The rule, under the decisions, is not of universal application, but nearly so.[2]

"It will be seen that the engagement of the sleeping car company, so far as it goes, is exactly the same as the duties assumed by an inn-keeper. A passenger, on entering a sleeping car as a guest—because that is what he is, in fact—necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort, or necessity. The articles, when placed in the care of the company's employees, are *infra hospitum*, and are at the company's risk. The liability of inn-keepers is imposed from considerations of public policy, as a means of protecting travelers against the negligence and dishonest practices of the inn-keeper and his servants. Occasionally, no doubt, the inn-keeper is subjected to losses without any fault on his part. This, however, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor, to insure the security of travelers. Besides, where loss is sustained, neither party being in fault, it must be borne by one of them, and it is no more unjust to place it on the inn-keeper than on the guest. The liabilities incident to the business, are to be considered in fixing the charges for the service.[3] Except in the matter of furnishing meals, there seems to be no essential dif-

1 Phillips *v.* Evans, 64 Mo. 17.

2 Phillips *v.* Henson, 30 Moak, Eng. R. 19; Thompson *v.* Ward, L. R. 6 C. P. 327; Bradley *v.* Baylis, L. R. 8 Q. B. Div. 175; Ness *v.* Stephenson, L. R. 9 Q. B. Div. 245; Hickman *v.* Thomas, 16 Ala. 666; Ullman *v.* State, 1 Tex. App. 220.

3 Mason *v.* Thompson, 9 Pick. 283.

ference between the accommodations at an inn, and those on a sleeping car, except that the latter are necessarily on a smaller scale than at an inn. In both cases the porter meets the traveler at the door, and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but may, if he so desires, go forward into the other cars on the train, and at stations may go out on the platform. A passenger in a sleeping car need not avail himself of these privileges, but the fact that he may do so, and that many persons actually do avail themselves of the same, is well known to every traveler, and to the company, and is a circumstance in the case. It is said that it would be unjust to hold the company to the same liability as an inn-keeper, because thieves might take one or more berths in a car, and at the first opportunity leave the car, carrying what articles they could steal before leaving. The same is true of an inn-keeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can, and escape, yet no one would contend that the inn-keeper would not be responsible for the property so stolen at night or in the daytime; yet in many of the large inns of this country, at least, there are numerous doors for ingress, while in a sleeping car there are but two. Were meals served on a sleeping car, no one would contend that it differed from an inn in its accommodations. In this State meals are furnished on the through trains, and a passenger need not leave the train from the time of entering it, until he reaches the end of the line. This, however, does not appear to have been the case on the railway in question. But the fact that meals are taken at designated stations on

the line of the road, instead of on the train itself, does not change the character of the service rendered. So far as such services are rendered, they are the same in kind as those furnished by an innkeeper; and the security of travelers, and as a means of protecting them, not only against the negligence, but also against the dishonest practices of the agents or employees of the sleeping car company, requires that the company, so far as it renders service as an inn-keeper, shall be subject to like liabilities and obligations. The judgment is, therefore, affirmed. The other judges concur."

§ 328. **The Liability of the Sleeping Car Company.** —Nevertheless, according to the weight of authority, the liability of the sleeping car company is not that of an inn-keeper, but its duty in this respect, is simply to take reasonable care to protect the property of the passenger, especially while he is asleep, and for any neglect of this duty, it will be responsible.[1] It must, therefore, keep a watch during the night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants.[2] This duty is not, however, restricted to the period when the passenger is sleeping, but it extends to keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him, nor watch himself, while he is absent from his berth preparing his toilet, or for other necessary purposes,[3] or where he may temporarily leave the car, leaving his personal baggage there.[4] Thus, the company has been held liable, where

1 Cases cited in last two sections.

2 Blum Case, *supra;* Woodruff Sleeping Car Co. *v.* Diehl, 84 Ind. 474; Diehl *v.* Woodruff, 10 Cent. L. J. 66; Palmeter *v.* Wagner, 11 Alb. L. J. 149; Ill. Cent. R. Co. *v.* Handy, 63 Mass. 609; 56 Am. Rep. 846; Scaling *v.* Pull. Pal. Car Co., 24 Mo. App. 29; Carpenter *v.* R. Co., 124 N. Y 53; 26 N. E. Rep. 277.

3 Root *v.* Sleeping Car Co., 28 Mo. App. 199.

4 Pull. Pal. Car Co. *v.* Pollock, 5 S. W. Rep. 815 (Tex.).

property in the plaintiff's berth was stolen while he was asleep, both the conductor and porter being asleep at the rear end of the car for two or three hours, leaving the front door unlocked, and a brakeman sitting in the front end of the car;[1] where the conductor was absent from the car for a distance of 84 miles, having left the train altogether, leaving no one about the car but the porter, who was engaged in blacking boots in a room at the end of the car;[2] where the plaintiff, having occasion to open her valise, which was in her berth, was assisted by the conductor who, instead of returning it to the berth, said it would be perfectly safe in the unoccupied seat opposite, and himself placed it there, from which place it was stolen in the night;[3] where money was stolen from the passenger's berth while he was asleep; another passenger lost a sum of money in a similar manner at the same time; and the porter was found asleep in the early morning, having been on duty for 36 hours, including two nights, continuously;[4] where the only employee kept on the car while it ran from New York to Boston, making eight stops on the way, was a man who acted as conductor, porter and bootblack.[5]

The word baggage has the same meaning here as in a former section, including clothing and personal ornaments, and articles for personal use, and a reasonable sum of money for his traveling expenses,[6] but not money in the keeping of the passenger to an

1 Blum Case, *supra.*

2 Diehl *v.* Woodruff, 10 Cent. L. J. 66; Woodruff Sleeping Car Co. *v.* Diehl, 84 Ind. 474. And see Bevis *v.* R. Co., 56 Am. Rep. 850; 26 Mo. App. 23; Scaling *v.* Pull. Pal. Car Co., 24 Mo. App. 29; Pull. Pal. Car Co. *v.* Gardner, 16 Am. & Eng. R. R. Cas. 324.

3 Hampton *v.* Pull. Pal. Car Co., 42 Mo. (App.) 140.

4 Lewis *v.* New York Cent. Sleeping Car Co., 9 N. E. Rep. 615.

5 Carpenter *v.* R. Co., 26 N. E. Rep. 277; 124 N. Y. 53.

6 Blum's Case, *ante;* Diehl *v.* Woodruff, 10 Cent. L. J. 66; Woodruff Sleeping Car Co. *v.* Diehl, 84 Ind. 474; Root *v.* Sleeping Car Co., 38 Mo. App. 199; Hampton *v.* Pullman Palace Car Co., 42 Mo. App. 134.

amount beyond what would be required for traveling expenses.[1]

The duty of a sleeping car company to protect its passengers from thieves, cannot be got rid of by words printed upon the passenger's ticket, or notices posted in the car.[2]

The sleeping car company is liable for such articles in the custody of the passenger as fall within the denomination of "baggage," and which there is a duty upon it to protect, even where they are stolen or abstracted by its servants,[3] and in such an action, the

[1] Ill. Cent. R. Co. *v.* Handy, 63 Miss. 609; 56 Am. Rep. 846; Root *v.* Sleeping Car Co., 28 Mo. App. 197; Wilson *v.* R. Co., 32 Mo. App. 682; Barrott *v.* Pull. Pal. Car Co., 51 Fed. Rep. 796; Hillis *v.* R. Co., 33 N. W. Rep. 643 (Ia.); Blum's case, *ante*.

[2] Louisville etc. R. Co. *v.* Katzenberger, 16 Lea, 380; 87 Am. Rep. 232; 1 S. W. Rep. 44; Stevenson *v.* Pull. Pal. Car Co., 26 S. W. Rep. 112 (Tex.).

[3] Root *v.* Sleeping Car Co., 28 Mo. App. 199. In a recent case in Georgia (Pull. Pal. Car Co. *v.* Martin, 22 S. E. Rep. 700), a passenger was robbed of her jewelry and money while in her berth, and the Supreme Court after a review of the evidence affirms a judgment against the company in this language: "That this passenger lost her jewelry and money, and that she lost them while a passenger in this car, are both facts which may be taken as established beyond controversy by the evidence. The plaintiff's testimony places the porter, the servant of this defendant, in such a situation as that he might easily have purloined her property. According to his own statement, it was not necessary for him to have put his head inside her berth. According to her statement, he did put his head inside of her berth, and thereafter she found her satchel open and her purse gone. These circumstances, even in the face of a denial by the porter, would have furnished strong inferential evidence that he was the man who appropriated these goods. His guilt, we think, is practically demonstrated by his own testimony and that of the conductor. According to the conductor, he was constantly on guard from the time the passengers retired the evening before until 3 o'clock in the morning; and if his testimony be true—and it is not disputed by any one—it would have been impossible for any person without his knowledge to have intruded upon the privacy of this passenger during this interval, and stolen her property. According to the testimony of the porter, from 3 o'clock a. m. until the time when the passengers arose he was constantly on guard for the purpose of protecting the persons and property of the passengers against the depredations of other people; that he was in a position where he could have seen and would have seen any person who intruded upon the passengers in that car, and that no such thing was done. So that, according to his own statement and the statement of the conductor, it would have been impossible for any person other than one of these two to have robbed this plaintiff between the hour when she retired and the hour when she arose. But since she was robbed, and since, as we have seen, it would have been impossible for any person other than one of these two to have robbed her, then the inference is that she was robbed by the one or the other of these employes; and for the larceny of either the company would be responsible. We think the evidence of this plaintiff established beyond contro-

contributory negligence of the passenger would be no defense.[1] But as to articles not baggage, the passenger having no right to their free transportation, there is no duty on the carrier to protect it, and if such property should be stolen by its servants, the carrier would not be responsible, for "a master is not liable for the torts or crimes his servant commits, not within the scope of his employment, but to effect some purpose of his own, unless such tort or crime is of itself a violation of some duty which the master has assumed toward the person injured, and which he has undertaken to perform through the servant."[2]

And the sleeping car company is bound to protect the *persons* of its patrons against the negligence or willful misconduct of its employees, whom it places in charge of its cars. In a case in the Federal Court, a female passenger, while in her berth, was indecently assaulted by the porter, and a verdict against the company for $11,000 was affirmed by the Supreme Court of the United States.[3]

versy that the porter intruded his head into her berth and stole her property. He was the person identified by the passenger as having intruded upon her privacy, According to his testimony, at the time she says it was done it would have been impossible for any person other than he to have entered unobserved. This was the view the jury might have taken of this case in the court below. The only reasonable conclusion to be drawn from this evidence is that the servant of the defendant, whose duty it was to guard the person and property of this passenger while she slept, purloined the chattels sued for; and we therefore think that, without reference to the liability imposed upon the company for injuries resulting from the negligence of its employes, the jury were justified in finding against it because of the larceny committed by its servants."

1 Root *v.* Sleeping Car Co., *supra.* "The duty of the defendant through its servants," it is well said in this case 'would be to protect the passenger's property although discovered in an exposed condition where his carelessness may have left it." Bonner *v.* De Mendoza, 16 S. W. Rep. 776 (Tex.); Wilson *v.* R. Co., 32 Mo. App. 682; Pull. Pal. Car Co. *v.* Matthews, 12 S. W. Rep. 744 (Tex.).

2 Root *v.* Sleeping Car Co., 28 Mo. App. 199, citing Croft *v.* Alison, 4 B. & Ald. 590; Coal Co. *v.* Helman, 86 Pa. St. 418; Mitchell *v.* Crassweller, 13 C. B. 236; Jackson *v.* R. Co., 87 Mo. 430; Finncane *v.* Small, 1 Esp. 315; Schmit *v.* Blood, 9 Wend. 268; Whitemore *v.* Harroldson, 2 Lea, 312.

3 Campbell *v.* Pull. Pal. Car Co., 42 Fed. Rep. 484; affirmed in 154 U. S. 1069 (Co-op. Ed.); see further on the subject *Ante* § 298.

§ 329. **Passenger Elevators.**—The development of our law, and the application of its principles to new conditions, finds a good illustration in that most modern of inventions, the passenger elevator. It is hardly more than five years since the first case of this character was presented, in all its important aspects, to a court of last resort;[1] but when so presented, that court found little difficulty in applying to it, the rules governing the liabilities of carriers of passengers by the older agencies of ship, stage-coach and railroad,[2] and in holding that the proprietor of elevators for the carrying of persons, is subject to the strict rules governing other carriers of passengers; that he undertakes to carry persons riding thereon, as safely as human care and foresight can do so;[3] that he is liable for the slightest neglect in regard to the vehicles themselves, and must exercise extraordinary diligence and care in their management; that he must use the utmost care and diligence in providing safe and suitable vehicles of this character, and in their management, by proper agents and servants,[4] both in receiving, carrying and discharging passengers;[5] that he is respon-

1 Treadwell *v.* Whittier, 80 Cal. 575; 13 Am. St. Rep. 175; 22 Pac. Rep. 266.

2 The running of the elevator is an invitation to all persons to use it. But where in a store there was an elevator for passengers and another elevator for freight, and a person used the freight elevator and was injured the court said: "Defendants had made ample provision for the transportation of persons to the upper floors of the building. Plaintiff chose to ride in an elevator which to his knowledge was provided for another purpose, knowing at the same time that a passenger elevator had been provided and was in operation. The invitation extending from the defendants to take the passenger elevator was in its nature express, and the situation negatived any possible inference of an invitation to take the freight elevator." Amerine *v.* Porteous, 63 N. W. Rep. 300 (Mich.).

3 Treadwell *v.* Whittier, *supra;* Goodsell *v.* Taylor, 41 Minn. 207; 16 Am. St. Rep. 700; 42 N. W. Rep. 873; *aliter* as to freight elevators unless used to carry passengers. Kern *v.* De Castro Co., 125 N. Y. 50; 25 N. E. Rep. 1071; Gibson *v.* Leonard, 32 N. E. Rep. 182.

4 Treadwell *v.* Whittier, *supra;* Tousey *v.* Roberts, 114 N. Y. 312; 11 Am. St. Rep. 655; 21 N. E. Rep. 399; Bourgo *v.* White, 34 N. E. Rep. 191; Murphy *v.* Hays, 68 Hun, 450; 23 N. Y. (Supp.) 70; People's Bank *v.* Morgolofski, 75 Md. 432; 23 Atl. Rep. 1027.

5 Mitchell *v.* Marker, 54 Fed. Rep. 637; 62 Fed. Rep. 139.

sible for defects in them which might have been discovered by the most careful and thorough examination;[1] that he is responsible for the neglect of the manufacturer;[2] that the breaking of any part of the machinery raises a presumption of negligence on his part, and throws the burden of exoneration upon him;[3] and that this extraordinary responsibility is towards passengers and not towards his own employes and servants.[4] "The same degree of care and responsibility," say the Court in this case,[5] "must attach to one controlling and running an elevator. Persons who are lifted by elevators, are subjected to great risks to life and limb. They are hoisted, vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator, must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of the very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control, by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments, to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the person carried. In proportion to the degree of danger to others, must be the care

[1] Treadwell *v.* Whittier, *supra;* Goodsell *v.* Taylor, 41 Minn. 207; 16 Am. St. Rep. 700; 42 N. W. Rep. 873; Shattuck *v.* Rand, 142 Mass. 83; 7 N. E. Rep. 43; Oberfelder *v.* Doran, 26 Neb. 118; 41 N. W. Rep. 1094.

[2] Treadwell *v.* Whittier, *supra.*

[3] Treadwell *v.* Whittier, *supra;* Goodsell *v.* Taylor, *supra.* See Huey *v.* Gablenbeck, 121 Pa. St. 238; 15 Atl. Rep. 520.

[4] O'Brien *v.* West Steel Co., 100 Mo. 182; 18 Am. St. Rep. 536; 13 S. W. Rep. 402; Donovan *v.* Gay, 97 Mo. 440; 11 S. W. Rep. 44; Bier *v.* Standard Man'f'g Co., 130 Pa. St. 446; 18 Atl. Rep. 637; Davidson *v.* Davidson, 46 Minn. 117; 48 N. W. Rep. 560; Lawson *v.* Merrall, 69 Hun, 278.

[5] Treadwell *v.* Whittier, *supra.*

and diligence to be exercised; where the danger is great, the utmost care and diligence must be employed. In such cases, the law requires extraordinary care and diligence. We know of no employment where the law should demand a higher degree of care and diligence, than in the case of persons using and running elevators for lifting human beings from one level to another. The danger of those being raised, is great. When persons are injured by the giving way of the machinery, the hurt is always serious, frequently fatal; and the law should, and does, bind persons so engaged, to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public in courts to abate, in any degree, from this high degree of care. The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring. The cruelty from a careless use of such a contrivance, is likely to fall on the weakest of the community. All, including the strongest, are without the means of self-protection upon the breaking down of the machinery. The law, therefore, throws around such persons, its protection, by requiring the highest care and diligence."

§ 330. **Postmasters and Mail Carriers.**—He who carries for hire or gratuitously, the letter of another, is a bailee for hire or without reward, as the case may be, and liable, like bailees of other kinds of chattels, for a default on his part, whereby the letter is lost; but as the postoffice department, which, in all countries does almost all the carrying of this description, is a branch of the Government, it follows that the sufferer, through the neglect of that department, is practically remediless, for the reason that the

State or Government is not liable to an action at the suit of a private person.[1] "Whence," it is said by Mr. Schouler,[2] "is derived this exceptional responsibility at our law narrowing down, as it appears, to a practical immunity from the consequences of careless transmission, where property is received in bailment at the postoffice? Not from any mysterious significance attached to the business itself, which might, in any country be left to private individuals, nor, as we apprehend, from a public policy which singles out bailors of this class as specially suitable for bearing their own losses. It comes from this admitted state of things in Great Britain and the United States: that government carries on the post office; and the sovereign authority, on broad reasons of policy, refuses to submit its conduct to judicial inspection, or to respond to the suit of any private individual. The bailor who suffers from mal-administration, may have abstract right on his side; but the courts are shut to him, and consequently his legal injury is without the means of redress. As for the individual postmaster, he is but a public agent, or servant of the government, and under the usual rules of agency, should not answer personally for the merely careless performance of his master's business." The only safeguard and security for the safe transmission of packages by mail, is that which is thrown around it by the regulations of the government, which announce that all valuables sent by mail, shall be at the risk of the owner. All that the government promises, in case of loss of money or other valuables from the mail, is to endeavor to recover them and to punish the offender.[3]

1 Laws. Contr., § 119.
2 Bail. § 270.
3 Foster *v.* Metts, 55 Miss. 77; 30 Am. Rep. 504.

Therefore, the Postmaster-General, postmasters[1] and contractors for carrying the mail,[2] are not liable for losses occasioned by their agents, clerks and servants employed under them, unless they have been guilty of negligence in not selecting persons of suitable skill, or in not exercising a reasonable superintendence over their acts and conduct.[3] In the leading English case,[4] the action was against the Postmaster-General of England, for negligence in the execution of his office, by which a letter containing divers exchequer bills of the plaintiff, being delivered into the office at London, to be sent by post to Worcester, was opened in the office, and the exchequer bills enclosed, taken away. It appeared, in a special verdict, that a letter of the plaintiff's, containing eight exchequer bills, was deposited in the post office in London, which was in charge of the defendant's deputy, and the letter opened in the office, by some person unknown, and the bills taken away. It was held by three judges, against an elaborate dissenting opinion of Lord Holt, that the defendant was not liable for the defaults of the official and agents of the postoffice, on the ground that the postoffice was an institution of government, established and regulated by law; that all the officers and agents of the postoffice were officers and agents of the government, and not the agents and servants of the postmaster; that no contract was made by the postmaster, or any officer or agent of the postoffice, with

1 Keenan *v.* Southworth, 110 Mass. 474; 14 Am. Rep. 613; Dunlap *v.* Monroe, 7 Cranch 242; Schroyer *v.* Lynch, 8 Watts. 453; Bishop *v.* Williamson, 2 Fairf. 495; Wiggins *v.* Hathaway, 6 Barb. 632; Bolan *v.* Williamson, 1 Brev. 181; Maxwell *v.* McIlvoy, 2 Bibb. 211; Rowning *v.* Goodchild, 3 Wils., 443.

2 Foster *v.* Metts, 55 Miss. 77; 30 Am. Rep. 505; Hutchins *v.* Brackett, 22 N. H. 252; 53 Am. Dec. 248; Cent. R. Co. *v.* Lampley, 76 Ala. 357; 52 Am. Dec. 334, *Contra*, Sawyer *v.* Corse, 17 Gratt. 243; 94 Am. Dec. 445.

3 Foster *v.* Metts, *supra.*

4 Lane *v.* Cotton, 1 Ld. Ray 646; 12 Mod. 472; 1 Salk. 17 (1701), followed in Whitfield *v.* Lord Le Despencer, 2 Cowp. 754 (1778).

those who use the public accommodation of the office; that each officer and agent was liable, in a proper form of action, to any individual who had suffered by his neglect of duty; but that no officer or agent was liable for the default of another." In the leading case in this country—the action being brought against a mail carrier—the court say: "The package of bank bills, in this case, came into the possession of defendants as mail contractors, and the duty of transportation resulted from that capacity. Common carriers are persons who carry for hire; their obligation is only to the person with whom they have contracted to carry. Their duties and responsibilities arise from fee and reward, and they are liable only to persons in privity of contract. A mail carrier has no contract with those who transmit articles by the public mail, he receives no fee or reward from them. His contract is with the Government of the United States, for the performance of acts in execution of a public function. He is remunerated by the Government. The duty he takes upon himself by the contract, he is sworn to perform. He acts for the general Government, in the performance of a function, which the Government is charged to have executed. So far, then, as the transmission of mail is concerned, a mail contractor is a public agent, and, as such only, responsible. The rules applicable to public and private agencies, are different. All agents, of whatever character, are responsible for all acts of misfeasance, and willful wrong. A private agent is not responsible to the party injured, for his acts of mere negligence or omission, but his principal, only. Public agents are regarded as principals, for the purpose of responsibility, and are liable to all persons injured by their negligence or omission, as well as by their acts of misfeasance. If this were not the

case, the injured party would be without redress, as the Government can not be presumed to indemnify the public at large against the wrongful and negligent acts of subordinate officers or agents. But public agents, although in one sense treated as principals, are not responsible for the omissions, negligence, or misfeasance of those employed under them, if they have employed trustworthy persons of suitable skill and ability, and have not co-operated in the wrong. Hence, the defendants being public agents, they are not responsible for the loss accruing by the negligence, or misfeasance, of the drivers."[1]

Each is liable, however, for his own negligence,[2] for it is a well established rule that whenever a person has suffered an injury from the negligence or unskillfulness of a public officer acting ministerially, an action for damages lies against such officer on the part of the party injured.[3] The fact that the defendant contracts to faithfully perform the duties of his office, with the government and not with the person injured, is no defense to the action, as it is not brought upon the contract, but upon the breach of duty.[4] Thus, a postmaster has been held liable where he kept his office in another's store, and the servants of the latter had free access to the letters and mail matter;[5] where he permitted a person who was not a duly appointed deputy, and sworn in according to law, to handle the

1 Connell *v.* Voorhees, 13 Ohio 523; 42 Am. Dec. 206.

2 Danforth *v.* Grant, 14 Vt. 283; 39 Am. Dec. 224, or for refusing to deliver a letter. Teall *v.* Felton, 1 N. Y. 237; 49 Am. Dec. 352; 12 How. 284.

3 Wharton Agency, sec. 547; Story Agency, 320, 321; 2 Kent, 610; Kendall *v.* Stokes, 3 How. (U. S.) 87; Tyler *v.* Alfred, 38 Me. 530; Nowell *v.* Wright, 3 Allen, 166; Bartlett *v.* Crozier, 17 Johns. 449; 8 Am. Dec. 428; Adsit *v.* Brady, 4 Hill, 636; 40 Am. Dec. 305; Robinson *v.* Chamberlain, 34 N. Y. 389; Hoover *v.* Barkhoof, 44 N. Y. 113; Sawyer *v.* Corse, 17 Gratt. 230; Kennard *v.* Willmore, 2 Heisk. 619.

4 Henley *v.* Mayor, 5 Bing. 91; Burnett *v.* Lynch, 5 B. & C., 589; Farrant *v.* Barnes, 11 C. B. (N. S.) 553; Robinson *v.* Chamberlain, 34 N. Y. 389; Fulton F. I. Co. *v.* Baldwin, 37 N. Y. 648.

5 Ford *v.* Parker, 4 Ohio St. 520.

mails;[1] where receiving a letter to be sent registered, he sent it unregistered,[2] the court saying in the Alabama case:[3] "The exemption from liability of the postmaster for the defaults and misfeasance of his clerks and sub-assistants, is available to the postmaster only in cases where such clerks or sub-assistants are appointed in pursuance of some law expressly authorizing it, so that by virtue of the law and the appointment the appointees become in some sort public officers themselves. The rules and regulations of the postoffice department provide for employment of clerks and assistants, when necessary for a proper and speedy discharge of the business of the office; and, when made in pursuance of such rules and regulations, it may be the postmaster himself is not responsible for the defaults of his clerks and assistants, unless, under proper averments, it be shown there was negligence in their selection or superintendence, as we have stated above. Under the view we take of the evidence, these principles do not necessarily control the present case. A postmaster who employs a clerk or assistant, independent of express authority, and who is paid by him out of his own salary or means, is liable for the default or misfeasance of his clerk or assistant, as any private person would be for the acts of his agent or employe. The doctrine of respondeat superior applies in such cases."

1 Bishop *v.* Williamson, 2 Fairf. 495; Bolan *v.* Williamson, 1 Brev. 181; Coleman *v.* Frazier, 4 Rich. L. 145; 53 Am. Dec. 727; Raisler *v.* Oliver, 12 South. Rep. 238 (Ala.).

2 Fitzgerald *v.* Burrell, 106 Mass. 446.

3 Raisler *v.* Oliver, *supra.*

DIVISION III.

QUESTIONS OF PROOF AND DAMAGE.

CHAPTER XXII.

EVIDENCE.

SECTION 331. Introductory.
332. Burden of Proof.—Ordinary Bailments.
333. Burden of Proof—Innkeepers.
334. Burden of Proof—Common Carriers of Goods.
335. Proof of the Contract.
336. Quantum of Proof Required.
337. Proof that Loss within Excepted Causes.
338. Burden of Proof as to Negligence.
339. Burden of Proof under Special Circumstances.
340. Common Carriers of Passengers.—Burden of Proof of Negligence.
341. Burden of Proof of Contributory Negligence.
342. Burden of Proof.—Telegraph Companies.
343. Burden of Proof—Sleeping Car Companies.

§ 331. **Introductory.** —The question (in actions against ordinary bailees, as well as against common carriers and other exceptional bailees), of the *burden of proof as to the cause of the loss or injury and as to negligence or care on the part of the bailee*, is an important one, as in very many cases the real cause may be difficult or impossible to ascertain.

§ 332. **Burden of Proof.—Ordinary Bailments.**— As the law will not presume negligence on the part of a bailee, who will be regarded as having acted according to his trust until the contrary is shown, it has been sometimes said that the burden of proof is upon the bailor to show that the loss of his goods, or their damage while in the bailee's hands, arose from the bailee's neglect.[1] But such a rule, if applied to most cases of

1 Gilbart *v.* Dale, 5 Ad. & E. 543; Midland R. Co. *v.* Bromley, 17 Com. B. 372; Butt *v.* R. Co., 11 Com. B. 140; Finucane *v.* Small, 1 Esp. 315; Runyan *v.* Caldwell, 7 Humph. 134; Brown *v.* Johnson, 29 Tex. 40; Cross *v.* Brown, 41 N. H. 283; Lamb *v.* R. Co., 7 Allen, 98; Smith *v.* First Nat. Bank, 99 Mass. 605; 97 Am. Dec. 59.

injury to, or loss of bailed chattels, would leave the bailor practically remediless, because, being in the possession, and under the oversight of the bailee, and away from that of the bailor, it would be impossible for the bailee to know in what way or under what circumstances they had suffered damage. Therefore, it is now well settled that:

1. The bailor in the first instance, must prove the contract of bailment and the delivery of the goods to the bailee.

2. If he then proves that the goods have not been returned to him, or have been returned in a damaged condition, it will be presumed that this arose from the negligence of the bailee, if, after this proof, he refuses to account for, or explain the cause of the loss or damage,[1] or if the explanation he gives shows a loss or injury of a kind which does not ordinarily occur without negligence on the part of the custodian.[2] In the case of a gratuitous loan, if it be shown that the borrower has failed to return the chattel lent to him, according to promise, he is *prima facie* liable; and the burden will then rest upon him, of showing a loss without any fault of his.[3] Where a special deposit of property for gratuitous safe-keeping was made with a bank, which, through its cashier, issued a receipt for the property, specifying that the same was held subject to the order

[1] Logan *v.* Matthews, 6 Pa. St. 417; Boies *v.* R. Co., 37 Conn. 272; McDaniels *v.* Robinson, 26 Vt. 316; 62 Am. Dec. 574; Funkhouser *v.* Wagner, 62 Ill. 59; Goodfellow *v.* Meegan, 32 Mo. 280; Bennett *v.* O'Brien, 37 Ill. 250; Ford *v.* Simmons, 13 La. Ann. 397; Wiser *v.* Chesley, 53 Mo. 547; Collins *v.* Bennett, 46 N. Y. 490; Cumins *v.* Wood, 44 Ill. 416; 92 Am. Dec. 189; Cass *v.* R. Co., 14 Allen, 448; distinguishing Lamb *v.* R. Co., 7 Allen, 98; U. S. *v.* Yukers, 60 Fed. Rep. 641.

[2] Collins *v.* Bennett, 46 N. Y. 490; Arnot *v.* Braconnier, 14 Mo. (App.); Wintringham *v.* Hayes, 38 N. E. Rep. 999 (N. Y.). A trunk, for example, is left with B on storage. When it is returned the contents are watersoaked and mildewed. This carries a presumption of negligence. Reed *v.* Crowe, 13 Daly, 164.

[3] Edw. Bail., 175; Duval *v.* Mosker, 8 Johns. 445.

of the depositor, the cashier being duly authorized to issue such receipt, in an action by the depositor against the bank for the value of the property so deposited, it was held that a prima facie case for the plaintiff was made out by introducing the receipt in evidence, and proving a failure to deliver to the plaintiff on his demand, the property therein described, and the burden was thus cast upon the defendant of showing it had exercised, at least, slight diligence in the care and keeping of the property.[1] If the pledgee fails to return the pledge as agreed, or returns it in a bad order, a presumption arises which requires him at least to satisfactorily explain the reason of the loss or injury.[2] So, where a pledgee fails to deliver the pledge upon a proper demand, the burden of accounting for it is thrown upon him.[3]

The questions in this section arose in a recent case in Pennsylvania,[4] where the facts were as follows: The plaintiff, with his wife, visited the clothing store of the defendants for the purpose of purchasing a suit of clothes. Having selected a coat and vest, and wishing to try them on, he took off his watch and chain, and was about to lay the watch on a pile of clothing, when the salesman who was waiting on him said: "You had better put your watch here," indicating a drawer from which the vest had been taken, and adding: "It will be safe, I guess." The watch and chain were accordingly put in the drawer, and the drawer was closed by the salesman. The plaintiff, his wife, and the salesman, then went to another part of the store, where there was a mirror, and the coat and vest, having been tried on, were found to be satisfactory. They next

1 Merchants' Nat. Bk. *v.* Carhart, 22 S. E. Rep. 628 (Ga.).

2 Schoul. Bail., § 192; Story Bail., § 339; Crocker *v.* Monrose, 18 La. 553; 36 Am. Dec. 661.

3 Edw. Bail., 226.

4 Woodruff *v.* Painter, 24 Atl. Rep. 621.

turned their attention to the selection of a pair of pantaloons, in doing which the plaintiff went twice to a dressing room connected with the store. While he was thus engaged in trying on the pantaloons, the salesman conducted his wife to a seat some distance from the drawer in which the watch and chain had been placed, and to the vicinity of which she had returned after the coat and vest had been selected, and there entertained her during the time her husband was in the dressing room. When the entire suit had been selected, and the plaintiff had replaced the garments which he wore when entering the store, he said to the salesman, "Now we will take the watch." The salesman opened the drawer in which it had been placed, but it was not there. Several persons who had been in the store during the selection of the suit, but who had left, were sent for and questioned by one of the defendants, but the watch and chain were not found nor returned to the plaintiff. While search was being made for the watch, the plaintiff asked the salesman whether they were in the habit of putting things like it in the drawers, and he replied that they had done so many times, and nothing of the kind had happened before. Having paid for the suit purchased, the plaintiff asked one of the defendants whether he thought it was right that he, the plaintiff, should lose the watch. The reply was that he would have to lose it, but the defendants would do all they could to assist him in finding it. The watch was not returned to the plaintiff. The trial court on these facts non-suited the plaintiff. On appeal to the Supreme Court, its action was reversed, that Court holding that the storekeeper was a bailee for hire, the deposit of the watch being an incident to the business, and therefore beneficial to him;[1] and, that he

[1] *Ante*, citing Burwell *v.* Stern, 122 N. Y. 539; 25 N. E. Rep. 919, and saying: "Manifestly the bailment, in a case like the present, is of the latter

should have been called on to explain the loss to the jury, saying: "The remaining question is, whether, upon the assumption that there was a bailment for hire, proof of failure of the defendants to return the watch and chain upon demand was, under the circumstances, sufficient to carry the case to the jury. If what was said by the plaintiff should be taken as proof that the property was lost, we would be met with a conflict of authority elsewhere as to the effect of it, and find little in our own books to help us determine whether the burden was upon the plaintiff to prove negligence, or upon the defendants to repel the inference of it. But the plaintiff's evidence amounts to no more than that the salesman examined the drawer in which the watch had been placed, and some others, and did not find it, and that several persons, not employes of the defendants, who had been in the store and left, were sent for and interrogated, without result. All this did not prove a loss, nor even that the defendants said the watch was lost or had been stolen. In *Logan* v. *Mathews*,[1] it was held that if a bailee for hire return the property in a damaged state, and give no explanation how the injury happened, the burden of proof to show that there was no negligence, is upon him. In harmony with this judgment, a bailee who fails to give any such explanation of his neglect to restore the property intrusted to him as will enable the bailor to test his good faith, ought to be held to proof that he has exercised ordinary diligence in the care of it. Doubtless the defendants were entitled to the benefit of any inferences fairly deducible from their conduct when the watch was demanded, but such in-

class (a bailment for hire), for, while the customer pays nothing directly, or *eo nomine*, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade of which the bailment is a necessary incident." See *ante* § 31.

1 6 Pa. St. 417.

ferences were for the jury. If the case had been submitted to them, and they had found, as an inference from the facts proved, that the watch had been stolen, such finding would have been a complete exculpation, unless they further found that the defendants had not exercised ordinary care."

3. Where, however, the bailee's explanation satisfactorily explains the loss, and shows no want of care on his part, and there is no proof by the bailor from which negligence can be inferred, the defendant is entitled to a non-suit.[1]

§ 333. **Inn-keepers.** — It being proved that the goods were delivered to the inn-keeper, and that they have not been returned, or have been returned in a damaged condition, the burden of proving a legal excuse is upon the defendant.[2]

§ 334. **Common Carriers of Goods.** —In the carriage of goods, the shipper or owner makes out his case by proving their receipt by the carrier, and their non-delivery, sufficient time having elapsed for them to arrive at their destination, or their delivery in a damaged condition. This is enough; the carrier must now show that they were lost or damaged through some cause for which he is not by law responsible.[3]

1 Coleman *v.* Livingston, 45 How. Pr. 483; Willett *v.* Rich, 142 Mass. 356; 57 Am. Rep. 684; 7 N. E. Rep. 776.

2 Piper *v.* Manny, 21 Wend. 282; Hill *v.* Owen, 5 Blackf. 323; 35 Am. Dec. 124; Schoul. Bail. §§ 271, 272; Epps *v.* Hinds, 27 Miss. 657; 61 Am. Dec. 528; Wiser *v.* Chesley, 53 Mo. 547; Newson *v.* Axon, 1 McCord, 509; 10 Am. Dec. 685; Laird *v.* Eichold, 10 Ind. 212; 71 Am. Dec. 323; McDaniels *v.* Robinson, 26 Vt. 316; 62 Am. Dec. 574.

3 Nelson *v.* Woodruff, 1 Black, 156; Hunt *v.* The Cleveland, 6 McLean, 76; Bearse *v.* Ropes, 1 Sprague, 331; Kerr *v.* The Norman, 1 Newb. Adm. 525; Wolf *v.* American Express Co., 43 Mo. 421; 97 Am. Dec. 406; Lovering *v.* Union etc. Trans. Co., 42 Mo. 88; 97 Am. Dec. 320; Grogan *v.* Adams Express Co., 114 Pa. St. 523; 60 Am. Rep. 360; Chapman *v.* R. Co., 21 La. Ann. 224; 99 Am. Dec. 722; Shenk *v.* Phila. Steam Co., 60 Pa. St. 109; 100 Am. Dec. 541; Adams Ex. Co. *v.* Stettanars, 61 Ill. 184; Atchison etc. R. Co. *v.* Brewer, 20 Kas. 669; Boies *v.* R. Co., 37 Conn. 272.

§ 335. **Proof of the Contract.**—The common carrier who alleges that there is a contract between him and the customer limiting his common law liability, has the burden of proving such a contract.[1] If in writing, the writing must be shown; if oral, he must give such proof as is ordinarily required to establish the making of an agreement by word or mouth.[2]

§ 336. **Quantum of Proof Required.**—Though the case of carrier and customer is generally treated as one where the parties do not, in the making of their contracts, stand at arm's length,[3] yet the courts do not seem, in the proof of such contracts, to have applied the rule as to relations fiduciary or confidential, or where one is not able, on account of his necessities or position, to freely contract, viz., that proof of the position of the parties towards each other raises a presumption of undue influence, which throws upon the dominant one, the burden of showing that the contract was, in point of fact, fair, fully understood and reasonable.[4] While it is incumbent on the carrier to show that a contract containing exemptions in his favor, was made under circumstances indicating fairness and good faith; this being shown, it then devolves upon the customer to show that it ought not to be enforced against him, because it was obtained through fraud or undue influence, or without his real consent.[5]

1 Western Trans. Co. *v.* Newhall, 24 Ill. 466; 76 Am. Dec. 760; Gaines *v.* Union Trans. Co., 28 Ohio St. 418; Adams Ex. Co. *v.* Nock, 2 Duvall, 562; 87 Am. Dec. 510; Fillebrown *v.* R. Co., 55 Me. 462; 92 Am. Dec. 606; McMillan *v.* R. Co., 16 Mich. 79; 93 Am. Dec. 208; Am. Trans. Co. *v.* Moore, 5 Mich. 368; Baltimore etc. R. Co. *v.* Brady, 32 Md. 333; South. Ex. Co. *v.* Newby, 36 Ga. 635; Verner *v.* Sweitzer, 32 Pa. St. 208; Rosenfeld *v.* R. Co., 103 Ind. 121; 53 Am. Rep. 500; 2 N. E. Rep. 344; Chicago etc. R. Co. *v.* Abels, 60 Miss. 1017; St. Louis etc. R. Co. *v.* Lesser, 46 Ark. 236; Little Rock etc. R. Co. *v.* Talbot, 39 Ark. 523; Park *v.* Preston, 108 N. Y. 434; 15 N. E. Rep. 705; McElwain *v.* R. Co., 21 Week. Dig. 21; Schaeffer *v.* R. Co., 31 Atl. Rep. 1088 (Pa).

2 Am. Trans Co. *v.* Moore, *supra.*

3 *Ante* § 153.

4 See Lawson, Contr., § 259 *et seq.*

5 Adams Ex. Co. *v.* Guthrie, 9 Bush. 78; South. Ex. Co. *v.* Urquhart, 52 Ga. 142; Louisville etc. R. Co. *v.* Hedger, 9 Bush. 645; Boskowitz *v.* Adams Ex. Co., 5 Cent.

§ 337. **Proof that Loss within Excepted Causes.** —The burden of proof is upon the carrier not only to show that a limiting contract has been made, but also that the damage or loss in question arose from a cause excepted in this contract.[1] And this fact must be established with reasonable certainty, and not rest upon conjecture or possibility; for if upon the whole case it is doubtful whether the loss arose from an excepted cause or through the negligence or want of skill of the carrier, the latter will have to bear it.[2] It is not enough for him to show that it *might* have arisen from that cause; he must prove that it did;[3] and whether the loss happened through an excepted cause or by the negligence of the carrier, is in every case a question for the jury.[4] Where goods arrive in a damaged condition, and it is apparent that the damage was in a great part caused by the carrier's fault, though to some extent would probably have been caused by the perils of the sea encountered by the vessel, but to what extent

L. J. 58; Lawrence *v.* R. Co., 36 Conn. 63; under the English statutes the burden of showing that a condition was "just and reasonable" is on the carrier; Peck *v.* R. Co., 10 H. L. Cas. 473.

1 The Freedom, L. R. 3 P. C. 594; Clark *v.* Barnwell, 12 How. 272; Rich *v.* Lambert, 12 How. 347; Zerega *v.* Poppe, 1 Abb. Adm. 347; Verner *v.* Sweitzer, 32 Pa. St. 208; Bennett *v.* Filyaw, 1 Fla. 403; Alden *v.* Pearson, 3 Gray, 342; Bearse *v.* Ropes, 1 Sprague 331; The Emma Johnson, 1 Sprague, 527; Hunt *v.* The Cleveland, 1 Newb. Adm. 221; Mahon *v.* The Olive Branch, 18 La. Ann. 107; Ewart *v.* Street, 2 Bailey, 157; Swindler *v.* Hilliard, 2 Rich. 286; 45 Am. Dec. 732; Cameron *v.* Rich, 4 Strob. 168; 53 Am. Dec. 670; 5 Rich. 352; 57 Am. Dec. 747; Richards *v.* Hansen, 1 Fed. Rep. 54; The Pharos, 9 Fed. Rep. 912; The Polynesia, 16 Fed. Rep. 702; Shriver *v.* R. Co., 24 Minn. 506; 31 Am. Rep. 353; Merchants' Disp. Trans. Co. *v.* Bloch, 86 Tenn. 392; 6 Am. St. Rep. 847; 6 S. W. Rep. 881; Chicago etc. R. Co. *v.* Abels, 60 Miss. 1017; The Lydian Monarch, 23 Fed. Rep. 278; St. Louis etc. R. Co. *v.* Lesser, 46 Ark. 236; Brown *v.* Adams Ex. Co., 15 W. Va. 812; Nave *v.* Pacific Ex. Co., 19 Mo. (App.) 564; Winn *v.* R. Co., 31 Iowa 583; Grogan *v.* Adams Ex. Co., 114 Pa. St. 523; 7 Atl. Rep. 134; American Ex. Co. *v.* Second Nat. Bk., 69 Pa. St. 394.

2 The Live Yankee, 1 Deady, 420.

3 The Compta, 4 Sawy. 375; Tygert *v.* The Sinneckson, 24 Fed. Rep. 304; Collier *v.* Valentine, 11 Mo. 299; The Mangalore, 23 Fed. Rep. 462; Hill *v.* Sturgeon, 28 Mo. 323; Gillespie *v.* R. Co., 6 Mo. (App.) 554. See The Ferne *v.* Holme, 24 Fed. Rep. 502.

4 Marsh *v.* Blyth, 1 Nott & McC. 170; Hammond *v.* McClure, 1 Bay, 99; Gordon *v.* Buchanan, 5 Yerg. 71; Humphreys *v.* Reed, 6 Whart. 435.

the carrier is unable to show, he will be held liable for the whole.[1]

§ 338. **Burden of Proof as to Negligence.**—The carrier, having proved that the loss or damage arose from an excepted cause, is he required to go further and prove also that he was guilty of no negligence contributing to the excepted loss? On this question the authorities are not agreed. In most of the States and in the Federal Courts, upon the carrier showing that the loss or damage arose from a cause for which, according to the terms of the contract, he was not to be held responsible, the burden of proving neglect or want of care on his part, devolves upon the shipper.[2]

1 Speyer *v.* The Mary Belle Roberts, 2 Sawy. 1.

2 This is the rule in the Federal Courts: The Antoinetta C., 5 Ben. 564; Bazin *v.* Steam. Co., 3 Wall. Jr. 229; Bearse *v.* Ropes, 1 Sprague, 331; Carey *v.* Atkins, 6 Ben. 562; Clark *v.* Barnwell, 12 How. 272; The Invincible, 1 Low. 225; The Juniata Paton, 1 Biss. 14; The Keokuk, 1 Biss. 522; King *v.* Shepherd, 3 Story, 349; The Lady Pike, 2 Biss. 141; Lamb *v.* Parkman, 1 Sprague, 343; The Mollie Mohler, 2 Biss. 505; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; The Niagara *v.* Cordes, 21 How. 7; The Ocean Wave, 3 Biss. 317; The Olbers, 3 Ben. 148; The Oriflamme, 1 Saw. 176; Rich *v.* Lambert, 12 How. 347; The Rocket, 1 Biss. 354; Transportation Co. *v.* Downer, 11 Wall. 129; Turner *v.* The Black Warrior, 1 McAll. 181; Turney *v.* Wilson, 7 Yerg. 340; Van Schaack *v.* Northern Trans. Co., 3 Biss. 394; The Vivid, 4 Ben. 319; Clark *v.* Barnwell, 12 How. 272; The New Orleans, 26 Fed. Rep. 42; The Banacouta, 39 Fed. Rep. 288; Gleason *v.* Virginia Co., 5 Mackay, 36; Wertheimer *v.* R. Co., 1 Fed. Rep. 421; The Montana, 17 Fed. Rep. 377; 22 Id. 715; The New Orleans, 26 Fed. Rep. 44; The Pereire, 8 Ben. 301; Six Hundred and Thirty Casks, 14 Blatchf. 517; The Portueuse, 35 Fed. Rep. 670; The J. C. Stevenson, 17 Fed. Rep. 540; The Vincento T., 10 Ben. 228; The Saratoga, 20 Fed. Rep. 869; The Adriatic, 16 Blatchf. 424; Marx *v.* The Britania, 34 Fed. Rep. 906. *Arkansas*—Little Rock etc. R. Co. *v.* Talbot, 39 Ark. 523; St. Louis etc. R. Co. *v.* Weakly, 50 Ark. 397; 7 Am. St. Rep. 104; 8 S. W. Rep. 134; Little Rock R. Co. *v.* Corcoran, 40 Ark. 375; Little Rock R. Co. *v.* Harper, 44 Ark. 208. *Connecticut* — Lawrence *v.* R. Co., 36 Conn. 63; see Boies *v.* R. Co., 37 Conn. 272. *Florida*—Bennett *v.* Filyaw, 1 Fla. 403. *Iowa* — Mitchell *v.* U. S. Ex. Co., 46 Ia. 214. *Kansas*—Kallman *v.* U. S. Ex. Co., 3 Kas. 205; Kansas etc. R. Co. *v.* Reynolds, 8 Kas. 623. *Louisiana*—Brauer *v.* The Almoner, 18 La. Ann. 266; Kelham *v.* The Kensington, 24 La. Ann. 100; Kirk *v.* Folsom, 23 La. Ann. 584; New Orleans Ins. Co. *v.* R. Co., 20 La. Ann. 302; Price *v.* The Uriel, 10 La. Ann. 413; Thomas *v.* The Morning Star, 13 La. Ann. 269; 71 Am. Dec. 509. *Maine*—Sager *v.* R. Co. 31 Me. 228. *Maryland*—Balt. etc. R. Co. *v.* Brady, 32 Md. 333; Bankard *v.* R. Co. 34 Md. 197; 6 Am. Rep. 321. *Massachusetts*—Alden *v.* Pearson, 3 Gray, 342. *Missouri*—Clark *v.* R. Co., 64 Mo. 440; Hill *v.* Sturgeon, 35 Mo. 212; 86 Am. Dec. 149; Read *v.* R. Co., 60 Mo. 199; Davis *v.* R. Co., 89 Mo. 340; 1 S. W. Rep. 327; Witting *v.* R. Co., 28 Mo. (App).

This may be called the American doctrine, and is founded upon the reason that negligence is a positive wrong, and will not be presumed, but he who alleges it, must prove it.

In a few States, the rule as stated in Greenleaf, is followed, viz.: "And if the acceptance of the goods was special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was, on his part, no negligence or want of due care."[1] The reasons given for this view, are that the owner does not, as a rule, go with his property, and in case of loss or injury, however gross the negligence may be, is un-

103; 101 Mo. 631; 14 S. W. Rep. 743, overruling Levering *v.* Union Trans. Co. 42 Mo. 88; 97 Am. Dec. 320; Ketchum *v.* Ex. Co., 52 Mo. 390; Heil *v.* R. Co. 16 Mo. (App.) 363. *New Jersey*—New Brunswick Steam Co. *v.* Tiers, 24 N. J. (L.) 677. *New York*—French *v.* R. Co., 4 Keyes, 108; Lamb *v.* R. Co., 46 N. Y. 271; 7 Am. Rep. 327; Magnin *v.* Dinsmore, 6 J. & S. 284; Moore *v.* Evans, 14 Barb. 524; Sunderland *v.* Westcott, 2 Sweeny, 260; 4 How. Pr. 468; Tyson *v.* Moore, 56 Barb. 442; Whitworth *v.* R. Co., 87 N. Y. 413; Canfield *v.* R. Co., 93 N. Y. 532; Sutro *v.* Fargo, 41 N.Y. (S. C.) 231. *North Carolina*—Smith *v.* R. Co., 64 N. C. 235. *Pennsylvania*—Farnham *v.* R. Co., 55 Pa. St. 34; Am. Ex. Co. *v.* Sands, 55 Pa. St. 140; Colton *v.* R. Co., 67 Pa. St. 211; 5 Am. Rep. 424; Patterson *v.* Clyde, 67 Pa. St. 500; Forbes *v.* Dallett, 9 Phila. 515; Penn. R. Co. *v.* Raiordan, 119 Pa. St. 577; 4 Am. St. Rep. 670; 13 Atl. Rep. 324. *Tennessee*—Jones *v.* Walker, 5 Yerg. 427; Turney *v.* Wilson, 7 Yerg. 340; see Dillard *v.* R. Co., 2 Lea. 288.

[1] 2 Greenleaf Evidence § 219; in *Georgia.*—Berry *v.* Cooper, 28 Ga. 543; Southern Express Co. *v.* Newby, 36 Ga. 635; 91 Am. Dec. 783; see Ocean S. S. Co. *v.* McAlpin, 69 Ga. 437. *Minnesota.*—Hall *v.* R. Co., 43 N. W. Rep. 391; Shriver *v.* R. Co., 24 Minn. 506; 31 Am. Rep. 353; Lindsley *v.* R. Co., 36 Minn. 539; 1 Am. St. Rep. 692; 33 N. W. Rep. 7; Southard *v.* R. Co., 62 N. W. Rep. 442, 619. *Mississippi.*—Chicago etc. R. Co. *v.* Moss, 60 Miss. 1003; 45 Am. Rep. 428; Chicago etc. R. Co. *v.* Abels, 60 Miss. 1017. *Ohio.*—Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Ohio St. 362; 62 Am. Dec. 285; United States Express Co. *v.* Bachman, 2 Cin. Rep. 251; affirmed, 28 Ohio St. 144; Erie R. R. Co. *v.* Lockwood, 28 Ohio St. 358; Gaines *v.* Union Trans. Co., 28 Ohio St. 418; Union Express Co. *v.* Graham, 26 Ohio St. 595. *Pennsylvania.*—Whitesides *v.* Russell, 8 Watts & S. 44; Hays *v.* Kennedy, 41 Pa. St. 378; 80 Am. Dec. 627, probably overruled in later cases, see *ante. South Carolina.*—Swindler *v.* Hilliard, 2 Rich. 216; Baker *v.* Brinson, 9 Rich. 201; 67 Am. Dec. 48; Cameron *v.* Rich, 4 Strob. 168; 53 Am. Dec. 670. *Texas.*—Ryan *v.* R. Co., 65 Tex. 13; 57 Am. Rep. 588. *West Virginia.*—Brown *v.* Adams Ex. Co., 15 W. Va. 8129. In Alabama, where the carrier shows that the loss occurred from a cause for the consequences of which he is not liable under his contract, the *onus* is still on him to show the exercise of due care and diligence on his part to prevent the injury. Steele *v.* Townsend, 37 Ala. 247; 79 Am. Dec. 49; South etc. R. R. Co. *v.* Henlein, 52 Ala. 606; 23 Am. Rep. 578; Mobile etc. R. Co. *v.* Jarboe, 41 Ala. 644.

able to prove it without relying upon the servants of the carrier—the very persons generally by whose negligence (if there was negligence), the goods have been lost; whose feelings, wishes and interests are all against the owner, and who are, as a general rule, only too ready to exculpate themselves and their employer. Of the manner of the loss the owner is generally entirely ignorant, while the carrier and his servants may be reasonably supposed to be fully advised in regard to it. And while it is a rule of evidence that he who alleges must prove, there is another rule, viz., that the burden of proof is upon him who best knows what the facts are. The minority courts certainly seem to have the better of the argument.

§ 339. **Burden of Proof Under Special Circumstances.** —The burden of proof is upon the shipper to show that the loss was from a cause for which, by the very terms of the contract, the carrier was to be liable. Thus, where the liability of a common carrier for loss or damage is limited by express contract to the case of fraud or gross negligence of himself, his agents or his servants, in an action against him, the burden of proving such fraud or negligence is on the plaintiff, who must also show that such fraud or negligence was the cause of or at least contributed to the injury.[1] Where the exceptions are conditional, the carrier must show his compliance with the conditions, as where iron is shipped, the carrier not to be liable for rust if the iron is properly stowed, he must show that it was properly stowed.[2]

[1] Adams Express Co. *v.* Loeb, 7 Bush, 499; Bankard *v.* R. Co., 34 Md. 197; Landsberg *v.* Dinsmore, 4 Daly, 490; Steers *v.* Liverpool etc. Steamship Co., 57 N. Y. 1. To instruct the jury in such a case that the burden of proof is on the defendant is error, and the judgment will be reversed on appeal, notwithstanding the fact that the evidence as it stands shows negligence. Cochran *v.* Dinsmore, 49 N. Y. 249; Cragin *v.* R. Co., 51 N. Y. 61 (1872).

[2] Edwards *v.* The Cahawba, 14 La. Ann. 224.

§ 340. **Common Carriers of Passengers.—Burden of Proof of Negligence.**—In the carriage of passengers, the proof of (a) an accident or of (b) an injury to the passenger, does not, standing alone, create a presumption of negligence on the part of the carrier, though such a statement is frequently found in the adjudicated cases.[1]

(a) A carrier of passengers is not an insurer; accidents may happen, due to no want of care on his part, and for which he is not responsible; and to presume, in all cases where an accident occurs, that the carrier was negligent, would be to presume what is known to be untrue.[2] "Accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them. The straying of cattle or horses upon the road causes numerous accidents, which are not chargeable to the company. If a drunken man falls asleep, or a deaf man incautiously walks upon the road, in consequence of which a train is unavoidably thrown from the track, and a passenger is injured, he is without redress as against the company. So, if a careless driver, in crossing a track fails to get his vehicle out of the way of an approaching train. How, then, can it be assumed, without proof of any sort, when an accident has occurred, that it was caused by some careless-

[1] See Laing *v.* Colder, 8 Pa. St. 479; 49 Am. Dec. 533; Yeomans *v.* Contra Costa Co., 44 Cal. 71; George *v.* R. Co., 34 Ark. 613; Zemp *v.* R. Co., 9 Rich. (L.) 84; Wilkie *v.* Bolster, 3 E. D. Smith, 327; Tennery *v.* Pippinger, 1 Phila 543.

[2] Deyo *v.* R. Co., 34 N. Y. 9; Robbins *v.* Mount, 4 Robt. 562; 33 How. Pr. 33; Sheldon *v.* R. Co., 14 N. Y. 224; Button *v.* R. Co., 18 N. Y. 252; Warner *v.* R. Co. 44 N. Y. 471; Curran *v.* Warren Chemical Works, 36 N. Y. 156; Ferris *v.* Union Ferry Co., 36 N. Y. 314; Gillespie *v.* R. Co., 6 Mo. (App.) 554; Saunders *v.* R. Co., 60 N. W. Rep. 148 (S. D.).

ness on the part of the agents of the company, and not by any or either of these numerous causes?"[1]

The plaintiff's evidence shows that a malicious person had placed an obstruction on the track, or taken up a rail, or misplaced a switch at night, and the train is derailed;[2] or that a bridge is burned or blown down by a public enemy or by an unprecedented storm;[3] or that a ship is fired upon by a pirate and sunk; or that the train was blown from a track by a tornado;[4] or a passing load of hay ran into the side of a street car[5]—in a suit by the injured passenger, these facts being shown, no presumption of negligence on the part of the carrier could arise.[6]

But the machinery for and means of transportation being under his exclusive management and control, and the carrier having contracted that it shall be sufficient, and that his servants in charge thereof will use skill and care in its management, whenever it appears that the accident has occurred through some defect in his vehicle or machinery used in the transportation, or in the road upon which he operates them, a presumption of negligence at once arises, founded upon the probability of the existence of some defect which extreme vigilance, aided by science and skill, could have detected.[7] In the leading case on this subject,[8] it is

1 Curtis *v.* R. Co., 18 N. Y. 534; 75 Am. Dec. 258.

2 Deyo *v.* R. Co. 34 N. Y. 9; Latch *v.* R. Co., 27 L. J. (Ex.) 155.

3 Sawyer *v.* R. Co., 37 Mo. 240; Kas. Pac. R. Co. *v.* Miller, 2 Col. 442.

4 McClary *v.* R. Co., 3 Neb. 44; 19 Am. Rep. 631.

5 Fed. St. R. Co. *v.* Gibson, 96 Pa. St. 83.

6 Thomp. Carr. Pass., 214.

7 Christie *v.* Griggs, 2 Camp. 79; Carpue *v.* R. Co., 5 Q. B. 747; Boyce *v.* California Stage Co., 25 Cal. 460; Transportation Co. *v.* Downer, 11 Wall. 129; Farrish *v.* Reigle, 11 Gratt. 697; 62 Am. Dec. 666; Brehm *v.* R. Co., 34 Barb. 256; McKinney *v.* Neil, 1 McLean, 540; Stockton *v.* Frey, 4 Gill, 406; 45 Am. Dec. 138; Stokes *v.* Saltonstall, 13 Pet. 181; Lygo *v.* Newbold, 9 Ex. 302; Laing *v.* Colder, 8 Pa. St. 479; 49 Am. Dec. 533; Galena etc. R. Co. *v.* Yarwood, 15 Ill. 468; 17 Ill. 509; 65 Am. Dec. 682; Feitel *v.* R. Co., 109 Mass. 398; Bowen *v.* R. Co., 18 N. Y. 408; Toledo etc. R. Co. *v.* Beggs, 85 Ill. 80; Pitts. etc. R. Co. *v.* Thompson, 56 Ill. 138; Balt. etc. R. Co. *v.* Wightman, 29 Gratt, 431; Railroad Co. *v.* Pollard, 22 Wall. 341; Meier *v.* R. Co., 64 Pa. St. 230; Sullivan *v.* R. Co., 30 Pa. St. 234; Walker *v* R. Co., 63 Barb. 260; Dougherty *v.* R. Co., 9 Mo. (App.) 484; Caldwell *v.* New Jersey Steam Co., 47 N. Y. 282; Brown *v.* R. Co., 49 Mich. 153; 13 N. W. Rep. 494; Chicago etc. R. Co. *v.* Trotter, 60 Miss. 412; Rose *v.* Stephens etc. Trans. Co., 20 Blatchf. 411; Sawyer *v.* R. Co., 37 Mo. 240; Balt. etc. R. Co. *v.* Noell, 32 Md. 594; Young *v.* Kinney, 28 Ga. 111; Smith *v.* British Packet Co., 46 N. Y. (S. C.) 86; 86 N. Y. 408.

8 Curtis *v.* R. Co., 18 N. Y. 534; 75 Am. Dec. 258.

said: "It is the duty of all engaged in this business in any mode, to use care to secure the safety of the passenger, proportioned to the danger incident to the mode of conveyance. In case this care is applied, as a general result, the safety of the passenger will be secured, so far as that safety depends upon the state or condition of any of the means provided by the carrier, and used in the business. If there is no imperfection in any of these, and suitable caution is employed by those engaged in their application, everything dependent thereon will accomplish the end in view. This is as certain as the laws of mechanics. When, therefore, an injury is received from a derangement of anything employed by the carrier, the presumption necessarily arises that there existed somewhere an imperfection in the machinery employed, or negligence in its application. It is the duty of the carrier to provide perfect machinery, and if he has failed in this, it devolves upon him to show the excuse, if any. This is the rule applicable to all cases where a party seeks exoneration from a duty imposed upon him by law, or incurred by contract. The plaintiff has established his cause of action when he has shown a failure to perform the duty from which he has sustained an injury. It is for the defendant, then, to show the facts relieving him from responsibility in the particular case. This imposes no hardship upon the defendant in this class of cases. The whole management is exclusively under his control. He has ample means to show the true cause of the difficulty. The plaintiff knows nothing about it. He takes passage with the carrier, who, instead of conveying him safely, inflicts an injury upon him by the failure of some part of the machinery employed by him. In many cases it would be impossible for the plaintiff to ascertain the particular defect,

and, I think, no such obligation is imposed upon him by the rules of evidence."

Therefore, where the passenger is injured on account of a stage, hack or omnibus breaking down, or overturning;[1] or the horses running away or starting while the passenger is alighting;[2] or a railroad car or train running off the track or overturning;[3] or a defective, broken or misplaced rail or switch, causing a derailment;[4] or the washing away of the embankment supporting the track;[5] or the collision of vehicles, whether railroad trains, street cars, ships or other conveyances;[6] the breaking of an axle,[7] or wheel;[8] or the explosion of a boiler;[9] or the breaking down of a bridge,[10]

1 Ware *v.* Gay, 11 Pick. 106; Farish *v.* Reigle, 11 Gratt. 697; 62 Am. Dec. 666; Frink *v.* Potter, 17 Ill. 406; Fairchild *v.* California Stage Co., 13 Cal. 599; Boyce *v.* California Stage Co., 25 Cal. 460; McKinney *v.* Neil, 1 McLean, 540; Stockton *v.* Frey, 4 Gill. 466; 45 Am. Dec. 138; Stokes *v.* Saltonstall, 13 Pet. 181; Saltonstall *v.* Stockton, Taney, 11; Lemon *v* Chanslor, 68 Mo. 30; Tennery *v.* Pippinger, 1 Phila. 543; McLean *v.* Burbank, 11 Minn. 277; Ryan *v.* Gilmer, 3 Mont. 517; Wall *v.* Livezay, 6 Colo. 465.

2 Roberts *v.* Johnson, 55 N. Y. 613; 5 J. & S. 157. "This showed *prima facie* either that the horses were unsuitable for such service or the driver incompetent or negligent in the performance of his duty."

3 Sullivan *v.* R. Co., 30 Pa. St. 234; Pittsburgh etc. R. Co. *v.* Thompson, 56 Ill. 138; Yonge *v.* Kinney, 28 Ga. 111; Zemp *v.* R. Co., 9 Rich. L. 84; Peoria etc. R. Co. *v.* Reynolds, 88 Ill. 418; Pitts. etc. R. Co. *v.* Williams, 74 Ind. 462; Stevens *v.* R. Co., 66 Me. 74; Feitel *v.* R. Co., 109 Mass. 398; Edgerton *v.* R. Co., 35 Barb. 389; 39 N. Y. 227; Berry *v.* R. Co., 124 Mo. 223, 272.

4 Georgia *v.* R. Co., 35 Ark. 613; Curtis *v.* R. Co., 20 Barb. 282; Baltimore etc. R. Co. *v.* Worthington, 21 Md. 275; Brignoli *v.* R. Co., 4 Daly, 182.

5 Philadelphia etc. R.Co. *v.* Anderson, 94 Pa. St. 351; 39 Am. Rep. 787. In Curtis *v.* R. Co., 18 N. Y. 534, 75 Am. Dec. 258, it is said: "The cases in which the carriers would be exempt from responsibility would be far less frequent where the transportation is upon railroads than where it is upon common roads, because railroad companies have the entire control of the track and of all engaged in its use."

6 Iron R. Co. *v.* Mowry, 36 Ohio St. 418; 38 Am. Rep. 597; New Orleans etc. R. Co. *v.* Allbritton, 38 Miss. 242; Railroad Co. *v.* Pollard, 22 Wall. 341; Walker *v.* R. Co., 63 Barb. 260; Smith *v.* R. Co., 32 Minn. 1; 50 Am. Rep. 550; 18 N. W. Rep. 827; Miller *v.* R. Co., 5 Mo. (App.) 471; Sherlock *v.* Alling, 44 Ind. 184;

7 Meyer *v.* R. Co., 64 Pa. St. 225; Balt. etc. R. Co. *v.* Wightman, 29 Gratt. 431; Balt. etc. R. Co. *v.* Noell, 32 Gratt. 374; Hegeman *v.* R. Co., 16 Barb. 353; 13 N. Y. 9.

8 Toledo etc. R. Co. *v.* Beggs, 85 Ill. 80; Yerkes *v.* Keokuk etc. Co., 7 Mo. (App.) 265.

9 Yeomans *v.* Contra Costo Nav. Co., 44 Cal. 71; Caldwell *v.* N. J. Steam Co., 47 N. Y. 282; Rose *v.* Stephens etc. Trans. Co., 20 Blatchf. 211; The New World *v.* King, 16 How. 469; Robinson *v.* R. Co., 20 Blatchf. 338.

10 Balt. etc. R. Co. *v.* Wightman, 27 Gratt. 431; Balt. etc. R. Co. *v.* Noell, 32 Gratt. 374.

the presumption of negligence on the part of the carrier, arises.

So, the presumption of negligence was held to arise where, before a passenger on a street car arrived at his seat, the car was started with a jerk throwing him against the window and lacerating his hand;[1] where a passenger on a railroad train which was slowly entering the station, while on her feet preparing to leave the car, was thrown down and injured by a sudden bump of the cars against each other;[2] where a passenger on a railroad train, was injured by the fall of a ventilating window of the coach in which he was riding;[3] where the landing plank of a steamboat fell while a passenger was crossing it.[4]

The same principle applies where the injury is the act of the servants or agents of the carrier. The carrier's duty is not only to provide safe machinery, but to employ competent persons to operate it. If the machinery is perfect and the servant is negligent in operating it, there is a breach of duty. And there is no distinction as to the burden of proof, and the presumption of negligence between a case where the injury is caused by the machinery being carelessly operated, and where the act of the servant is the proximate cause of the injury. Therefore, where a passenger by boat, while standing in a proper place on the boat, was injured by one of the carrier's servants en-

[1] Daugherty *v.* R. Co., 9 Mo. (App.) 478; 81 Mo. 325; 51 Am. Rep. 237. "As the team and brake are the means by which a stationary car is put in motion, when the movement was forward in the direction of that power, it is hardly reasonable to say it is merely conjectural that the motion came through the agency of the driver. Had the car been thus suddenly and violently jerked by the application of some other external force not under the control of the driver it would have been unusual and outside of the ordinary course of things. In such case it would certainly be reasonable to require the defendant to show such facts so peculiarly within its knowledge." Murphy *v.* R. Co., 36 Hun. 197; and see Balt. etc. R. Co. *v.* Swan, 32 Atl. Rep. 174 (Md).

[2] Railroad Co. *v.* Pollard, 22 Wall. 341.

[3] Och *v.* R. Co., 31 S. W. Rep. 962 (Mo.).

[4] Eagle Packet Co. *v.* Defries, 94 Ill. 598.

gaged in loading a bale of cotton on the boat allowing it to fall upon him, it was held that a presumption of negligent handling of the cotton arose.[1]

(b) The contract of the carrier does not insure against death or injury while upon the vehicle, but only so far as it arises from his failure to safely and securely transport the passenger. Hence, if it were shown only that the passenger was injured by a gunshot fired, or an object thrown from without;[2] or was struck by lightning and died while riding in the vehicle; or fell down while it was standing still,[3] there would be no presumption of negligence. As said in a Pennsylvania case: "A passenger may die while in his seat in a car, from disease, or from his own act, just as he might die in his own house from the same cause, but we never heard it alleged that the carrier was liable in damages because of a death so happening, nor that it was his duty to show affirmatively that the death was due to causes over which he had no control. Death from natural causes can hardly be called an accident, but if it was otherwise, yet there is a very broad distinction between the case of its coming to a passenger as an individual, by reason of circumstances and conditions that are personal and peculiar to him, and the case of its coming to a passenger as such by reason of accident to, or on account of, the means of transportation employed by the carrier, whether in motion or not. In the former class of cases, no presumption of negligence can arise, for the facts furnish no foundation for it. In the latter there is a presumption, not conclusive, but prima facie, on which the plaintiff may rest, and which the carrier must overcome."[4]

[1] Memphis etc. R. Co. *v.* McCool, 83 Ind. 392; 43 Am. Rep. 71; Hospes *v.* R. Co., 29 Fed. Rep. 763.

[2] Holbrook *v.* R. Co., 12 N. Y. 236; 64 Am. Dec. 502.

[3] Dougherty *v.* R. Co., 9 Mo. (App.) 480.

[4] Penn. R. Co. *v.* Riordan, 119 Pa. St. 77; 4 Am. St. Rep. 670; 13 Atl. Rep. 324.

The presumption does not arise where the injury to the passenger arises from an active, voluntary movement on his part, combined with some alleged deficiency in the carrier's means of transportation or accommodation; the reason being that here there may have been contributory negligence on the part of the passenger, who was able to see what he was doing, and control his movements.[1] In one case, the plaintiff, a female passenger, assisted by her husband, the train having stopped, was leaving the car platform when, on stepping from the lowest step to the ground, she in some way fractured her knee cap. It was held that this did not show a *prima facie* case of negligence on the part of the carrier.[2] The court said: "The cars were at rest on the track; there was no jar or breaking of machinery; Mrs. Napheys, with the assistance of her husband, was descending the steps from the platform of the car. They had every opportunity of seeing and knowing where she was going, and controlling her movements. If the lower step was inconveniently or dangerously high for her in the condition she was, she and her husband had as good opportunity as anyone else of knowing the fact. If they had even a suspicion that it was in the least degree unsafe for her to take the last step, there was no urgent necessity for her to do so. The train had reached its destination and there was no occasion for haste in leaving the car. If they had any apprehension of danger, or even inconvenience in descending from the lower step, there was nothing to prompt them to incur the risk. They might have called on those in charge of the train to provide a better and more convenient means of

[1] Thomp. Carr. Pas. § 214; see Le Barron *v.* East Boston Ferry, 11 Allen, 312; Chicago etc. R. Co. *v.* Trotter, 60 Miss. 412.

[2] Delaware etc. R. Co. *v.* Napheys, 90 Pa. St. 135.

egress, if they deemed it necessary. Taking the uncontradicted facts of the case, as they were presented, there existed no reason for relaxing the general rule that he who alleges negligence as the basis of a claim for damages, is bound to approve it affirmatively." In a very recent case in Georgia,[1] the plaintiff's evidence showed that she was a passenger, having with her two or three small bundles. When she entered the train, finding that the receptacles fastened to the side of the car above the seats for holding packages and bundles of passengers were beyond her reach, she stood upon a seat, and placed her bundles in the receptacle herself. No servant of the company saw her do this, nor did she ask any assistance in so doing. When she reached a point on her journey where it was necessary to change cars, she arose, stood upon the seat, and attempted to take down the bundles; and while in this position, the cars suddenly moved, and she was thrown from the seat on which she was standing, to the floor, and injured. The train had safely reached its destination, stopped at the usual place for passengers leaving the cars, remained there long enough for all of the passengers to alight, saving the plaintiff, and then moved down a few steps, where it stopped again. It did not appear that in the movement of the train there was any unusual jerk, nor that plaintiff called the attention of any servant of the defendant, to the situation of her bundles, or requested any assistance from them in her efforts to remove them from the place where she had deposited them. The servants of the company were outside the car, assisting the passengers who were alighting. None of them saw her attempt to get up on the seat. Said the court: "Railroad com-

[1] East Tenn. R. Co. *v.* Green, 22 S. E. Rep. 658.

panies, in the transportation of passengers, are bound to extraordinary care. They are not bound to take the greatest possible degree of care in the discharge of duties towards passengers, but the extraordinary care required of them is defined by the Code to be that extreme care and caution which every prudent and thoughtful persons use in and about similar matters. It is true the presumption of negligence arises when the fact of injury is shown, but in the very circumstances out of which the presumption arises it may likewise be rebutted. This plaintiff was in a perfectly safe situation. The company had provided her with a means of transportation which afforded every possible immunity against injury, as long as she enjoyed it in the manner usual to passengers, and in the manner designed by the company. The seats were made for the accommodation of passengers sitting upon them. It was not designed that they should be employed as footstools. The company had the right, reasonably, to expect that the passenger would not so use these contrivances, designed for his comfort and convenience, as to expose himself to danger; and, in moving its cars, it had the right to presume that the passenger would not employ these seats, designed for his convenience, and as well for the security of the company, in such a way as to expose himself to hazard and the company to loss. Its agents could not anticipate that at the time when this passenger was supposed either to have left the car, or to have been seated within it, she would be standing in a dangerous position upon one of the seats in the car. We do not think that this injury, therefore, can be attributed to any act of negligence upon the part of the company. The evidence points out no duty imposed by law or contract, the performance of which was omitted by the agents of the com-

pany, and it points out no act of negligence committed by them. This occurs to us to have been one of that class of injuries against the infliction of which no reasonable degree of human foresight could have made provision, and, so far as the company was concerned, it may be stated as resulting from pure accident. If not an accident, it is saved from that classification only by reason of the negligence of the passenger in exposing herself unnecessarily, in a hazardous position, to dangers against which the exercise of ordinary care and prudence upon her part would have afforded perfect immunity."

So, the mere fact that the plaintiff was run over during the time he was a passenger, does not throw the burden of proof of negligence on the carrier, for to be run over, he was, presumptively, not in the place where he ought to have been, viz., inside the car.[1] So, where an accident happens to the passenger, in consequence of his having thrust his arm out of the window, so that it comes in contact with some substance which the train is passing.[2]

§ 341. **Burden of Proof of Contributory Negligence.** —The plaintiff (according to the weight of authority, for there is a difference of opinion among the courts),[3] is not required, in making out his case to

[1] Mitchell *v.* R. Co., 30 Ga. 22; Railroad Co. *v.* Mitchell, 11 Heisk. 400; State *v.* R. Co., 58 Me. 221; Balt. etc. R. Co. *v.* State, 63 Md. 135.

[2] Thomp. Carr. Pass., 214.

[3] In some states it is incumbent upon the plaintiff in all actions for injuries through the negligence of another, to prove that he himself was in the exercise of due care at the time of the occurrence of the accident. *Connecticut.*—Beers *v.* R. Co., 19 Conn. 566; Park *v.* O'Brien, 23 Conn. 339; Fox *v.* Glastenbury, 29 Conn. 204; Birge *v.* Gardiner, 19 Conn. 507. *Illinois.*—Dyer *v.* Talcott, 16 Ill. 300; Chicago *v.* Major, 18 Ill. 347; Kepperly *v.* Ramsden, 83 Ill. 354; Missouri Furnace Co. *v.* Abend, 107 Ill. 44; 47 Am. Rep. 24; Aurora Branch R. Co. *v* Grimes, 13 Ill. 585; Chicago etc. R. Co. *v.* Hazard, 26 Ill. 373; Chicago etc. R. Co. *v.* Gregory, 58 Ill. 272; Galena etc. R. Co. *v.* Fay, 16 Ill. 300; 63 Am. Dec. 323; Galena etc. R. Co. *v.* Jacobs, 20 Ill. 478. *Iowa.*—Benton *v.* R. Co., 42 Ia. 192; Rusch *v.* Davenport, 9 Iowa, 443; Reynolds *v.* Hindman, 32 Iowa, 146; Plaster *v.* R. Co., 35 Iowa, 449; Carlin *v.* R. Co., 37 Iowa, 316; Muldowney *v.* R.

prove, in addition to the injury to himself from the proved or presumed negligence of the carrier, that he himself was free from contributory negligence.[1]

Co., 39 Iowa 645; 36 Iowa, 462; 32 Iowa, 176; Patterson *v.* R. Co., 38 Iowa, 279; Way *v.* R. Co., 40 Iowa, 341; Bonce *v.* R. Co., 53 Ia. 278; Nelson *v.* R. Co., 38 Ia. 539; 45 Ia. 661; Greenleaf *v.* R. Co., 29 Ia. 14; 4 Am. Rep. 181; Slosson *v.* R. Co., 55 Ia. 294. *Indiana.*—Bloomington *v.* Rogers, 83 Ind. 26; Louisville etc. R. Co. *v.* Orr, 84 Ind. 83; Louisville etc. R.Co. *v.* Lockridge, 93 Ind. 191; City of Fort Wayne *v.* De Witt, 47 Ind. 391; Jackson *v.* R. Co., 47 Ind. 454; Evansville etc. R. Co. *v.* Hiatt, 17 Ind. 102; Hathaway *v.* R. Co., 46 Ind. 25; Cincinnati etc. R. Co. *v.* McMullen, 117 Ind. 43; 20 N. E. Rep. 287; Jeffersonville etc. R. Co. *v.* Hendricks, 26 Ind. 228; Michigan etc. R. Co. *v.* Lantz, 29 Ind. 518; Toledo etc. R. Co. *v.* Brannagan, 75 Ind. 490; Mount Vernon *v.* Dusouchett, 2 Ind. 586; 54 Am. Dec. 467; Wayne *v.* Turnpike Co., 5 Ind. 286; Wabash Canal Co. *v.* Mayer, 10 Ind. 400; Indianapolis etc. R. Co. *v.* Keely, 23 Ind. 133; Evansville etc. R. Co. *v.* Dexter, 24 Ind. 411; Toledo etc. R. Co. *v.* Bevin, 26 Ind. 443; Pitts. etc. R. Co. *v.* Vining, 27 Ind. 513; Riest *v.* Goschen, 42 Ind. 339; City of Anderson *v.* Harvey, 67 Ind. 420; Gormley *v.* R. Co., 72 Ind. 31; Jefferson etc. R. Co. *v.* Logan, 72 Ind. 107; Pitts. etc. R. Co. *v.* Noel, 77 Ind. 110; Louisville etc. R. Co. *v.* Head, 80 Ind. 117. *Louisiana.*—Moore *v.* Shreveport, 3 La. Ann. 645; see Ryan *v.* R. Co., 21 South Rep. 30. *Maine.*—Benson *v.* Titcomb, 72 Me. 31; Gleason *v.* Bremen, 50 Me. 222; Buzzell *v.* Laconia Man. Co., 48 Me. 113; Dickey *v.* Maine Tel. Co., 46 Me., 483; Perkins *v.* R. Co., 29 Me. 307; Merrill *v.* Hampden, 26 Me. 234; Kennard *v.* Burton, 25 Me. 39; 43 Am. Dec. 349; Foster *v.* Desfield, 18 Me. 380; French *v.* Brunswick, 21 Me. 29; 38 Am. Dec. 250; Lesan *v.* R. Co., 77 Me. 85. *Massachusetts.*—In Thomp. Carr. Pass. 551 it is said: "The first case in Massachusetts which clearly decides that the burden of proof is upon the plaintiff to show the absence of contributory negligence on his part is Lane *v.* Crombie, 12 Pick. 177. The court treats the question as settled, and cites as authority Butterfield *v.* Forrester, 11 East, 61; Harlow *v.* Humiston, 6 Cow. 191; Smith *v.* Smith, 2 Pick. 621. These cases, however, go no further than to assert the doctrine that a plaintiff cannot recover if his evidence shows he was guilty of contributory negligence. Johnson *v.* Hudson R. Co., 5 Duer, 21, 25. The cases in Massachusetts follow Lane *v.* Crombie, Adams *v.* Carlisle, 21 Pick. 146; Bigelow *v.* Rutland, 4 Cush. 247; Bosworth *v.* Swansey, 10 Metc. 363; 43 Am. Dec. 441; Parker *v.* Adams, 12 Metc. 415; Lucas *v.* R. Co., 6 Gray, 64; Robinson *v.* R. Co., 7 Gray, 92; Callahan *v.* Bean, 9 Allen, 401; Hickey *v.* R. Co., 14 Allen, 429, 431; Gaynor *v.* R. Co., 100 Mass. 208; Murphy *v.* Deane, 101 Mass. 455; Allyn *v.* R. Co., 105 Mass. 77; Lane *v.* Atlantic Works, 107 Mass. 104; Copley *v.* R. Co., 136 Mass. 6; Crafts *v.* Boston, 109 Mass. 519; Prentiss *v.* Boston, 112 Mass. 43; Corcoran *v.* R. Co., 133 Mass. 507; Riley *v.* R. Co., 135 Mass. 292; Wheelwright *v.* R. Co., 135 Mass. 225; Taylor *v.* R. Co., 143 Mass. 470; 10 N. E. Rep. 308. *Michigan.*—Lake Shore R. Co. *v.* Miller, 25 Mich. 274; Detroit etc. R. Co. *v.* Van Steinburg, 17 Mich. 99; Le Baron *v.* Joslin, 41 Mich. 313; 2 N. W. Rep. 36; Mitchell *v.* R. Co., 51 Mich. 236; 47 Am. Rep. 566; 16 N. W. Rep. 388; Mynning *v.* R. Co., 67 Mich. 682; 35 N. W. Rep. 811. *Mississippi.*—Vicksburg *v.* Hennessy, 54 Miss. 391; Central R. Co. *v.* Mason, 51 Miss. 234. *New York.*—Spencer *v.* R. Co., 5 Barb. 337; Button *v.* R. Co., 18 N. Y. 248; Johnson *v.* R. Co., 20 N. Y. 65; Wilds *v.* R. Co., 24 N. Y. 430; Ernst *v.* R. Co., 24 How. Pr. 97; Tolman *v.* R. Co., 98 N. Y. 198; 50 Am. Rep. 649; Lee *v.* Troy Gas Co., 98 N. Y. 115. *North Carolina.*—Owens *v.* R. Co., 88 N. C. 502; Manley *v.* R. Co., 74 N. C. 655; Doggett *v.* R.Co., 78 N.C. 305. But it is the rule generally in these States that the plaintiff's due care may be inferred from the facts without being shown directly. Foster *v.* Dixfield, 18 Me. 380; French *v.* Brunswick, 21 Me. 29; Nelson *v.* R. Co., 38 Ia. 564; Murphy *v.* R. Co., 38 Ia. 539; 45 Ia. 661; Mayo. *v.* R. Co., 104 Mass. 137; Prentiss *v.* Boston, 112 Mass. 43; Hinckley *v.* R. Co., 120 Mass. 257.

[1] *Federal Courts.*—Railroad Co. *v.* Gladman, 15 Wall. 401; Crew *v.* R. Co., 20 Fed. Rep. 87; Indianapolis etc. R. Co. *v.*

The arguments in favor of this rule, which is almost universally favored by the text writers,[1] are that the law will never presume negligence, whether the party be charged with it or not, and that a presumption must arise from the natural instinct of self-preservation

Holst, 93 U. S. 291; Second *v.* R. Co., 5 McCrary, 515; Hough *v.* R. Co., 100 U. S. 213; Morgan *v.* Bridge Co., 5 Dill, 96; Dillon *v.* R. Co., 3 Dill. 325; Texas etc. R. Co. *v.* Volk, 151. U. S. 73. *Alabama.*—Smoot *v.* Wetumpka, 24 Ala. 112; Mobile etc. R. Co. *v.* Henshaw, 65 Ala. 566; Thompson *v.* Duncan, 76 Ala. 334. *Arizona.*—Hobson *v.* R. Co., 11 Pac. Rep. 545. *California.*—McQuillan *v.* R. Co., 50 Cal. 7; Finn *v.* Vallejo, 7 Cal. 225; Robinson *v.* R. Co., 48 Cal. 400; Gay *v.* Winter, 34 Cal. 183; Macdougall *v.* R. Co., 63 Cal. 431; May *v.* Hanson, 5 Cal. 360; 63 Am. Dec. 135; Nehrbas *v.* R. Co., 62 Cal. 320. *Colorado.*—Sanderson *v.* Frazier, 8 Colo. 79; 5 Pac. Rep. 632; Denver etc. R. Co. *v.* Ryan, 28 Pac. Rep. 79. *Dakota.*—Sanders *v.* Reister, 1 Dakota, 151; 46 N. W. Rep. 680. *Georgia.*—Thompson *v.* R. Co., 54 Ga. 509; see Prather *v.* R. Co., 80 Ga. 427; 9 S. E. Rep. 530. *Idaho.*—Hopkins *v.* R. Co., 13 Pac. Rep. 343. *Kansas.*—Kansas etc. R. Co. *v.* Pointer, 14 Kas. 37; 9 Kas. 620; Kansas etc. R. Co. *v.* Phillibert, 25 Kas. 583; Missouri Pac. R. Co. *v.* McCally, 41 Kas. 639; 21 Pac. Rep. 574. *Kentucky.*—Paducah etc. R. Co. *v.* Hoehl, 12 Bush. 41; Louisville etc. Canal Co. *v.* Murphy, 9 Bush. 522; Kentucky etc. R. Co. *v.* Thomas, 79 Ky. 160; 42 Am. Rep. 208; Louisville etc. R. Co. *v.* Goetz, 79 Ky. 442; 42 Am. Rep. 227. *Maryland.*—Frech *v.* R. Co., 39 Md. 574; Irwin *v.* Sprigg, 6 Gill. 206; Baltimore *v.* Marriott, 9 Md. 106; Northern etc. R. Co. *v.* State, 31 Md. 357; County Commissioners *v.* Burgess, 61 Md. 29. *Minnesota.*—Hocum *v.* Weitherick, 22 Minn. 152. *Missouri.*—Fulks *v.* R. Co., 19 S. W. Rep. 818; Crumpley *v.* R. Co., 19 S. W. Rep. 820; Thompson *v.* R. Co., 51 Mo. 190; Hicks *v.* R. Co., 65 Mo. 34; 64 Mo. 430; Schuerman *v.* R. Co., 3 Mo. App. 565; Lloyd *v.* R. Co., 53 Mo. 500; Buesching *v.* St. Louis Gas. Co., 73 Mo. 219; 39 Am. Rep. 503. *Nebraska.*—City of Lincoln *v.* Walker, 20 N. W. Rep. 113: Anderson *v.* R. Co., 52 N. W. Rep. 846. *New Hampshire.*—White *v.* R. Co., 30 N. H. 207; Smith *v.* R. Co., 35 N. H. 366. *New Jersey.*—Moore *v.* R. Co., 24 N. J. (L.) 268; New Jersey Ex. Co. *v.* Nichols, 32 N. J. (L.) 166; 33 Id. 434; Durant *v.* Palmer, 29 N. J. (L.) 544. *Ohio*—Cleveland etc. R. Co. *v.* Crawford, 24 Ohio St. 636; Balt. etc. R. Co. *v.* Whitacre, 35 Ohio St. 627. *Oregon.*—Grant *v.* Baker, 12 Oregon, 329; 7 Pac. Rep. 318. *Pennsylvania.*—Beatty *v.* Gilmore, 16 Pa. St. 463; Erie *v.* Schwingle, 22 Pa. St. 384; Penn. Canal Co. *v.* Bentley, 66 Pa. St. 30; Bush *v.* Johnson, 23 Pa. St. 209; Hays *v.* Gallagher, 72 Pa. St. 136; Allen *v.* Willard, 57 Pa. St. 374; Mallory *v.* Griffey, 85 Pa. St. 275; Weiss *v.* R. Co., 79 Pa. St. 387; Penn. R. Co. *v.* Weber, 76 Pa. St. 157; 72 Pa. St. 27; Penn. R. Co. *v.* McTighe, 46 Pa. St. 316; Hays *v.* Gallagher, 72 Pa. St. 136; Bradwell *v.* R. Co., 139 Pa. St. 404; 20 Atl. Rep. 1046. *Rhode Island.*—Cassidy *v.* Angell, 12 R. I. 447; 34 Am. Rep. 690. *South Carolina.*—Danner *v.* R. Co., 4 Rich. (L.) 329; 55 Am. Dec. 678; Carter *v.* R. Co., 19 S. C. 20; 45 Am. Rep. 754; Roof *v.* R. Co., 4 S. C. 61. *Texas.*—Texas etc. R. Co. *v.* Murphy, 46 Tex. 316; Dallas etc. R. Co. *v.* Spicker, 61 Tex. 427; 48 Am. Rep. 297; Houston etc. R. Co. *v.* Cowser, 57 Tex. 293; San Antonio etc. R. Co. *v.* Bennett, 76 Tex. 151; 13 S.W. Rep. 319; Railroad Co. *v.* Redeker, 67 Tex. 187; 2 S. W. Rep. 513; Gulf etc. R. Co. *v.* Shieder, 30 S. W. Rep. 904. *Vermont.*—Hill *v.* New Haven, 37 Vt. 501; but see Barber *v.* Essex, 27 Vt. 62; Dover *v.* Danville, 53 Vt. 183. *Washington.*—Spurrier *v.* R. Co., 29 Pac. Rep. 346. *West Virginia.*—Sheef *v.* Huntingdon, 16 W. Va. 317. *Wisconsin.*—Prideaux *v.* Mineral Point, 43 Wis. 513; 28 Am. Rep. 558; Hoyt *v.* Hudson, 41 Wis. 105; Achtenhagen *v.* Watertown, 18 Wis. 331; Potter *v.* Chicago etc. R. Co., 22 Wis. 615; *s. c.* 21 Wis. 372; Milwaukee etc. R. Co. *v.* Hunter, 11 Wis. 160.

[1] See Thomp. Carr. Pass. 551; 2 Redfield Rail. 253; Hutch. Carr. § 803.

that he was, at the time of the accident, in the exercise of due care and caution for his personal safety, and that, therefore, the injury was solely attributable to the conduct of the party proven to have been in fault; who, if he would relieve himself from legal liability for the damage sustained by reason of his negligence, is charged with the burden of showing that the plaintiff was negligent himself.

The arguments on the other side are that the plaintiff, being obliged to prove all the facts necessary to entitle him to recover, must prove, first, that the defendant was negligent, and secondly, that the injury occurred in consequence of that negligence. But to prove the latter, he must certainly show that the injury was not caused in whole or in part by his own negligence, for although the defendant was negligent, yet if the plaintiff's negligence contributed to the injury, then it is obvious that it did not occur through the defendant's negligence. Therefore, the plaintiff would not prove enough by merely showing negligence on the defendant's part; he must go further and prove that the injury was caused by this negligence, which must be done by showing a want of concurring negligence on his own part, which proof is no more, after all, than that the injury was caused by the negligence of the defendant.[1] "We think this argument fallacious," say the Supreme Court of Texas, in a late case.[2] "It assumes that plaintiff cannot recover unless it appears that the injury was caused solely by the negligence of defendant, when the law is that he may recover when defendant's negligence is only one of several contributing causes; the defendant being able to defend, where one of such causes is plaintiff's negli-

[1] See Park v. O'Brien, 23 Conn. 339.

[2] Gulf etc. R. Co. v. Shieder, 30 S. W. Rep. 902.

gence, not on the ground that his own negligence was not the sole cause of the injury, but upon the ground that the law will not permit plaintiff to recover where it is shown that his own wrongful or negligent act contributed to the injury. The real ground upon which the rule is based is the assumption that the law, from the fact that plaintiff was injured, raises a prima facie presumption that he was guilty of negligence contributing thereto. If this assumption be correct, then it follows that before he can recover he must show that he was not guilty of contributory negligence. We are of the opinion that the law raises no presumption of negligence, from the mere fact of injury, against either the plaintiff or the defendant. Negligence, like fraud, is a species of wrong, and will not be presumed. The rule seems to be well settled that it is not necessary for the plaintiff in his petition to negative, either by facts stated, or by express averment, the existence of contributory negligence on his part. This was held by Duer, J., in 1865;[1] by the Supreme Court of California in 1874;[2] by Chief Justice Roberts in 1876.[3] And Lord Penzance, in 1878, in delivering his opinion in the house of lords in a leading case,[4] said: 'I think I may safely say that no such declaration was ever seen.' We have been able to find no case where such pleading has been required, except in a few of those States where the burden of proof is upon plaintiff to show that he was not guilty of contributory negligence. Since these States have changed the well-established and logical rule of evidence at common law, consistency would seem to require a corresponding change in the rule of pleading; but it seems that only a few of

1 Johnson *v.* R. Co., 5 Duer, 22.
2 Robinson *v.* R. Co., 48 Cal. 426.
3 Railroad Co. *v.* Murphy, 46 Tex. 360; Railroad Co. *v.* Cowser, 57 Tex. 302.
4 Railway Co. *v.* Slattery, 3 App. Cas. 1180.

them have so ruled. As said in the Slattery case, above referred to: 'If any such burthen lay upon the plaintiff, it would certainly have been necessary for him, in the days when pleadings were required to be more precise and strictly accurate than perhaps they are now, to allege in his declaration that the accident happened without any such negligence on his own part as contributed to cause it. And yet I think I may safely say no such declaration was ever seen.' "[1]

To the rule followed in the majority of the States which imposes upon the defendant the burden of proof on the issue of contributory negligence, there are two well-defined exceptions: *First.* Where the legal effect of the facts stated in the petition is such as to establish prima facie negligence on the part of plaintiff as a matter of law, then he must plead and prove such other facts as will rebut such legal presumption. The plain reason is that by pleading facts which, as a matter of law, establish his contributory negligence, he has made a prima facie defense to his cause of action which will be accepted as true against him, both on demurrer and as evidence on the trial, unless he pleads and proves such other facts and circumstances that the court cannot, as a matter of law, hold him guilty of contributory negligence. When he has done this, he has made a case which must be submitted to the jury. For instance, if plaintiff's petition shows that he was injured by defendant's cars while on the track, under circumstances which in law would make him a trespasser prima facie, then the law would raise a presumption of contributory negligence against him, for which his petition would be bad on demurrer; and it would be necessary for him to plead some fact or circumstance rebutting such presumption—such as that he was,

[1] See, also, Johnson *v.* R. Co., 5 Duer. 26.

after going upon the track, stricken down by some providential cause—in order to save his petition, and on the trial the burden would be upon him to establish such cause.[1] *Second.* When the undisputed evidence adduced on the trial, establishes prima facie as a matter of law, contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from which the jury upon the whole case, may find him free from negligence; otherwise, the court may instruct a verdict for defendant, there being no issue of fact for the jury.[2]

§ 342. **Burden of Proof.—Telegraph Companies.** —Where the message is not delivered as sent, or is not delivered within a reasonable time, a presumption of negligence on the part of the company arises, and throws upon it the burden of showing that the failure arose from a cause for which it is not responsible in law.[3] So, where the destination of a message is on the line of a connecting company, the first company must show that it was properly delivered to the latter.[4] So, where a message is received by the company, at one of its offices in one State, for transmission to a

1 Houst. etc. R. Co. *v.* Sympkins, 54 Tex. 618.

2 Sanchez *v.* R. Co., 27 S.W. Rep. 922, and cases cited. Cassidy *v.* Angell, 12 R. I. 447; Houst. etc. R. Co. *v.* Sympkins, 54 Tex. 618; Gulf etc. R. Co. *v.* Shieder, 30 S. W. Rep. 902.

3 Ayer *v.* West. U. Tel. Co., 79 Me. 493; 1 Am. St. Rep. 353; Baldwin *v.* Tel. Co., 45 N. Y. 744; 6 Am. Rep. 165; De Rutte *v.* Tel. Co., 1 Daly, 547; 30 How. Pr. 403; Rittenhouse *v.* Ind. Line, 44 N. Y. 263; 4 Am. Rep. 673; Turner *v.* Tel. Co., 41 Iowa, 458; 20 Am. Rep. 605; Bartlett *v.* Tel. Co., 62 Me. 209; 16 Am. Rep. 437; Dorgan *v.* Tel. Co., 1 Am. L. T. 406; West. U. Tel. Co. *v.* Carew, 15 Mich. 525; Tyler *v.* Tel. Co., 74 Ill. 168; 24 Am. Rep. 279; 60 Ill. 421; 14 Am. Rep. 38; West. U Tel. Co. *v.* Meek, 49 Ind. 53; West. U. Tel. Co. *v.* Scircle, 103 Ind. 227; 2 N. E. Rep. 604; Redington *v.* Pac. Post Tel. Co., 40 Pac. Rep. 432 (Cal.); Tel. Co. *v.* Griswold, 37 Ohio St. 301; 41 Am. Rep. 500; Harkness *v.* Tel. Co., 73 Iowa, 190; 5 Am. St. Rep. 672; 34 N. W. Rep. 811; West. U. Tel. Co. *v.* Crall, 38 Kan. 679; 5 Am. St. Rep. 795; 17 Pac. Rep. 309; Fowler *v.* Tel. Co., 80 Me. 381; 6 Am. St. Rep. 211; 15 Atl. Rep. 29; Little Rock etc. R. Co. *v.* Davis, 41 Ark. 79; see Sweetland *v.* Tel. Co., 27 Iowa, 433; 1 Am. Rep 285; U. S. Tel. Co. *v.* Gildersleeve, 29 Md. 232; 96 Am. Dec. 519.

4 2 Turner *v.* Tel. Co., 51 Ia. 458; 20 Am. Rep. 295; Grange *v.* Tel. Co., 25 La. Ann. 383.

point in another State, and is never delivered to the person to whom it is addressed, it is incumbent on the company, in order to escape liability for a statutory penalty, to show that the message was in fact transmitted from that office with due diligence, and that the non-delivery to the sendee, was due to some default or other cause arising beyond the limits of the State.[1]

§ 343. **Burden of Proof.—Sleeping Car Companies.** —While probably the mere fact that a passenger in a sleeping car finds, when he awakes, that his money or valuables or other property which he has with him are missing, is not sufficient evidence of negligence on the part of the company, to call upon it to ex-

[1] West. U. Tel. Co. *v.* Howell, 22 S. E. Rep. 286 (Ga.), the court saying: "In the case at bar the plaintiff showed a breach of contract, and *prima facie* negligence, which must have occurred on the defendant's line, either in this state or in Alabama. Undoubtedly, it was in the exclusive power of the telegraph company to show the exact point where the failure of diligence occurred, and through the negligence of what particular servant it was occasioned. It will not do to say that the servants of the company are equally at the disposal of the plaintiff to prove the facts connected with the transaction. The truth of this assertion may be demonstrated by the peculiar facts here presented. The plaintiff, it is true, did know the company's agent at Lithonia, and perhaps could have secured him as a witness at the trial. But suppose this had been done, and he had testified that he had promptly forwarded the message to the relay office at Atlanta, but had no further knowledge as to the transaction. How could the plaintiff pursue his investigation and proof? Would he have to sue out interrogatories—for he could not compel personal presence in another county—directed to each and every one of the numerous employes of the company stationed in the Atlanta office? Certainly, the company could not reasonably be expected to aid him by furnishing a list of all its servants, nor to keep him posted when any of them resigned, or were transferred elsewhere. It might be, and doubtless is, often convenient to the company to change the location of its employes, and it could do so in the utmost good faith; but, whatever the motive, the inconvenience to the plaintiff in reaching them as witnesses would be the same. Again, it cannot be known that the telegraph company keeps such records in writing of its business as would enable the plaintiff to show the required facts by compelling the defendant to produce its records in court. Besides, how would it be known that such records, if kept at all, were correct? If the company itself did not see to it that evidence of negligence was not recorded against it, would it not be a temptation to its employes to omit making any record of their own shortcomings which might result in their discharge? And, at last, this would merely be a different way of compelling the company to supply evidence entirely within its own keeping. It follows from the foregoing that the default should be treated as having occurred in Georgia, the burden being on the defendant to show the contrary, and it having failed to do so."

plain the loss, yet where the circumstances of the theft tend to show that but for the defendant's negligence, the loss would not have occurred, a *prima facie* case of negligence arises, and the burden of proof is shifted.[1] And very slight evidence will be sufficient to take the case to the jury,[2] for a sleeping passenger can never know whether or not the defendant's servants are keeping diligent watch, they having the strongest interest to exonerate themselves from any charge of negligence. A rule that would prevent the case from going to the jury without affirmative proof that at the time when the theft took place, or at some time during the night, the defendant's servants were not keeping watch, would in most cases deprive passengers of any redress for the loss which they might sustain through the negligence of such carriers.

1 Bevis *v.* R. Co., 26 Mo. (App.) 21.

2 Pull. Pal. Car Co. *v.* Freudenstein, 34 Pac. Rep. 578 (Colo.).

CHAPTER XXIII.

DAMAGES.

SECTION 344. Measure of Damages.—Ordinary Bailments.
345. Measure of Damages.—Common Carrier of Goods.
346. Measure of Damages.—Common Carrier of Passengers.—For Breach of Contract.
347. Measure of Damages.—In Actions of Tort.
348. Exemplary or Punitive Damages.
349. Measure of Damages.—Telegraph Companies.
350. Damage for Mental Suffering.—Recoverable in Texas and other States.
351. The Texas Doctrine Denied in some States.
352. Arguments for and against the Texas Doctrine.

§ 344 **Measure of Damages.—Ordinary Bailments.**—If either bailor or bailee violate the contract of bailment whereby damage results to the other, the injured party has a right of action, the object of which is to place him, so far as money can do it, in the same situation as if the contract had been performed. The amount which the plaintiff is thus entitled to recover is called the measure of damages.[1] In an action by the bailor against an ordinary bailee, for not returning the bailed article, the measure of damages is the value of the article on the day it should have been returned with interest from that time;[2] or if the action be for returning it in a damaged condition, the measure of damages is the difference between its value as returned and its value had it been returned in good order.[3] The

[1] Laws. Contr., §§ 457, 458.

[2] Bull *v.* Douglass, 4 Munf. 303; 6. Am. Dec. 508; Christian *v.* Miller, 3 Leigh. 78; 23 Am. Dec. 251; Huntington *v.* English, 86 Pa. St. 247; Balt. etc. R. Co. *v.* Sewell, 35 Md. 238; 6 Am. Rep. 402; Day *v.* Perkins, 2 Sandf. 357; Fosdick *v.* Greene, 27 Ohio St. 484; 22 Dec. 328.

[3] Hyde *v.* Mech. Refrig. Co., 144 Mass. 432; 11 N. E. Rep. 673.

sale of a pledge without the proper notice or other legal formalities, will render the pledgee answerable for its true value, without any reference to the price at which it was sold.[1] And in some cases, as where the pledge consists of stock, the pledgor will be entitled to recover its increased value after the time of the actual conversion, and sometimes even down to the day of the trial. But the reasonable rule of damages would seem to be, to give the owner of the property its market value at the time he selects to call for it. The pledgee who has wrongfully appropriated the pledge, cannot complain of such a measure of damages.[2]

If the thing has been returned but not at the proper time, the bailor is entitled to recover his loss arising from the delay.[3] And in general, the law permits the recovery of anticipated profits where their loss might reasonably be supposed to have been in the contemplation of both parties, at the time of the making of the contract, as the result of non-performance,[4] provided the loss of the profits be the natural and necessary result of the breach,[5] and not losses arising from other collateral undertakings entered into upon the faith of

1 Edw. Bail., § 260; Simes *v.* Zane, 1 Phila. 501.

2 Edw. Bail. § 260; Pesch *v.* Consolidation Bk., 13 Phila. 157; see Clark *v.* Sparbank, 2 Week. Notes 111.

3 Story. Bail., § 269; Leonard *v.* Dunton, 51 Ill. 482; 99 Am. Dec. 568; Cothran *v.* Ellis, 107 Ill. 413; Russell *v.* Roberts, 3 E. D. Smith, 318.

4 U. S. *v.* Behan, 110 U. S. 338; 4 S. C. Rep. 81; Boyd *v.* Meighan, 48 N. J. L. 404; 4 Atl. Rep. 778; Hubbard *v.* Rowell, 51 Conn. 423; Schneider *v.* U. S., 19 Ct. of Cl. 547; Adams Ex. Co. *v.* Egbert, 36 Pa. St. 360; 78 Am. Dec. 382; Taft *v.* Tiede, 55 Ia. 370; 7 N. W. Rep. 617.

5 Coweta Falls Manfg. Co. *v.* Rogers, 19 Ga. 416; 65 Am. Dec. 602; McKinnon *v.* McEwan, 48 Mich. 106; 42 Am. Rep. 458; 11 N. W. Rep. 828; Hoy *v.* Gronoble, 34 Pa. St. 9; 75 Am. Dec. 628; Simmons *v.* Brown, 5 R. I. 299; 73 Am. Dec. 66; Adams Ex. Co. *v.* Egbert, 36 Pa. St. 360; 78 Am. Dec. 382; Field *v.* U. S., 16. Ct. of Cl. 434; Pitts. Steel Co. *v.* Hinckley, 17 Fed. Rep. 584; Goodrich *v.* Hubbard, 51 Mich. 63; 16 N. W. Rep. 232; Wisner *v.* Barber, 10 Or. 342; Fairchild *v.* Rogers, 32 Minn. 269; 20 N. W. Rep. 191; Donnell *v.* Jones, 17 Ala. 689; 52 Am. Dec. 194; Fuller *v.* Curtiss, 100 Ind. 237; 50 Am. Rep. 786; Howe Machine Co. *v.* Bryson, 44 Ia. 159; 24 Am. Rep. 735.

the promise.[1] And the profits which the bailee expected to realize from the keeping or the use of the thing, are recoverable by him from a bailor who refuses to deliver it in accordance with the contract.[2]

In the case of a loan, if the borrower has, by an improper use of the thing loaned, made a profit, that profit belongs to the lender.[3]

§ 345. **Measure of Damages.—Common Carriers of Goods.** —The measure of damages in actions against common carriers, is the value of the goods lost or the amount by which their value has been diminished by injury. And as the value of goods varies not only from time to time but in different places, and because goods are transported from place to place on account of the greater requirements of the people in one town or country for particular goods at particular times, this value is held to be the market price at the place of destination at the time when they should have been delivered.[4] If the goods are negligently delayed, the owner is entitled to recover the loss to him, caused by a fall in their market price during the time of the delay.[5]

The injury complained of must be, it should

[1] Masterton *v.* Mayor, 7 Hill, 61; 42 Am. Dec. 38; Wallace *v.* Ah. Sam, 71 Cal. 197; 60 Am. Rep. 534; 12 Pac. Rep. 46; Bridges *v.* Lanham, 14 Neb. 369; 45 Am. Rep. 121; 15 N. W. Rep. 704.

[2] Dean *v.* Ritter, 18 Mo. 182; Moore *v.* Lawrence, 16 Fed. Rep. 87; De Lavalette *v.* Wendt, 75 N. Y. 579; 31 Am. Rep. 494.

[3] Story Bail. § 269.

[4] Henderson *v.* The Maid of Orleans, 12 La. Ann. 352; Lewis *v.* The Success, 18 La. Ann. 1; Ingledew *v.* R. Co., 7 Gray, 66; Black *v.* R. Co., 45 Barb. 40; Brackett *v.* McNair, 14 Johns. 170; 7 Am. Dec. 447; O'Connor *v.* Forster, 10 Watts. 418; Ward *v.* R. Co., 47 N. Y. 29; 7 Am. Rep. 405; Armory *v.* McGregor, 15 Johns. 23; 8 Am. Dec. 205; McGregor *v.* Kilgore, 6 Ohio, 358; 27 Am. Dec. 260; Rathborne *v.* Neal, 4 La. Ann. 563; 50 Am. Dec. 579; Shaw *v.* R. Co., 5 Rich. 462; 57 Am. Dec. 769; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488; 68 Am. Dec. 575; Hand *v.* Baynes, 4 Whart. 204; 33 Am. Dec. 54; Dean *v.* Vaccaro, 2 Head. 488; 75 Am. Dec. 744; Laurent *v.* Vaughn, 30 Vt. 90; Lindley *v.* R. Co., 88 N. C. 547; The Mangalore, 9 Saw. 71; Texas, etc. R. Co. *v.* Nicholson, 61 Tex. 491; Taylor *v.* Collier, 26 Ga. 122; Davis *v.* R. Co., 1 Hilt. 543; Wallace *v.* Vigus, 4 Blackf. 260; Perkins *v.* R. Co., 47 Me. 573; 74 Am. Dec. 507; Spring *v.* Haskell, 4 Allen, 112;

[5] Collard *v.* R. Co., 7 H. & N. 79, Sisson *v.* R. Co., 14 Mich. 489; 90 Am. Dec. 253; Smith *v.* R. Co., 12 Allen, 531;

not be forgotten, the necessary and immediate consequences of the breach. This principle is illustrated and applied in the great case of *Hadley* v. *Baxendale*,[1] one of the leading cases on the measure of damages on the breach of a contract, and itself an action against a carrier of goods.[2] The rule there laid down is that the owner is entitled to recover those damages only which would be within the contemplation of the parties, as the probable result of the breach. When goods are given to a carrier, he may be presumed to understand that it is with some object that they are given to him, that he is to convey them to a certain place, and so convenience and benefit the sender of the goods, and he therefore understands that the delivery of these goods at their destination will result in profit to the consignor. Such profits, therefore, as would naturally arise from the sale of goods in the market, are recoverable as general damages. But if any special circumstances are communicated to the carrier, the damages resulting from a breach which both parties would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. On the other hand, if these special circumstances were wholly unknown to the carrier, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any circumstances, from such a breach of contract.[3] The expenses that the owner is put to in

90 Am. Dec. 166; Peet *v.* R. Co., 20 Wis. 594; 91 Am. Dec. 446; Weston *v.* R. Co., 54 Me. 376; 92 Am. Dec. 553; Deming *v.* R. Co., 48 N. H. 455; 2 Am. Rep. 267; Devereux *v.* Buckley, 34 Ohio St. 16; 32 Am. Rep. 342; St. Louis etc. R. Co. *v.* Phelps, 46 Ark. 485; Kent *v.* R. Co., 22 Barb. 278; Medbury *v.* R. Co. 26 Barb. 564; Briggs *v.* R. Co., 28 Barb. 515; Jones *v.* R. Co., 29 Barb. 633.

1 6 Ex. 314.

2 See Lawson Contr. § 459.

3 Hadley *v.* Baxendale, *supra*; Simpson *v.* R. Co., L. R. 1 Q. B. 277; Pacific Ex. Co. *v.* Darnell, 62 Tex. 639; Houston etc. R. Co. *v.* Jackson, 62 Tex. 209; Foard *v.*

replacing the goods, are also allowable, but not the vexation and inconvenience which he suffers, in consequence of the carrier's breach of contract.[1]

If a carrier refuses to carry goods that are brought to him for the purpose of being carried, the damages to be assessed will be regulated by the amount of damages actually and necessarily incurred.[2] Where, however, the wrong is of a malicious character, the jury may award exemplary or vindictive damages. Thus, if a carrier, with a view of obtaining a monopoly, or of injuring a rival company, refuses to carry goods which he is bound by law to carry, the jury will be directed to use their discretion in this mattter.[3]

§ 346. **Measure of Damages.—Common Carriers of Passengers.—For Breach of Contract.**—Where the action is for the breach of the carrier's contract of carriage, the damages are limited to such as are the natural and proximate consequences of the breach, such as may fairly be supposed to enter into the contemplation of the parties when they made the contract, and such as might naturally be expected to result from its violation.[4] Thus, if the carrier violates his contract by

R. Co., 8 Jones, 225; 78 Am. Dec. 277; Mather *v.* Ex. Co., 138 Mass. 55; 52 Am. Rep. 258; Wilson *v.* R. Co., 9 C. B. N. S. 632; Thomas etc. Mfg. Co. *v.* R. Co., 62 Wis. 642; 51 Am. Rep. 725; 22 N. W. Rep. 827; Waite *v.* Gilbert, 10 Cush. 177; Great West. R. Co. *v.* Redmayne, L. R. 1 C. P. 129. In a Texas case where an express company received a package of medicine which the agent was told contained a bottle of medicine for plaintiff's wife, who was sick, and it was negligently delayed, it was held that he could recover for both physical and mental suffering of his wife, caused by the negligent failure to deliver in time. Pacific Ex. Co. *v.* Black, 27 S. W. Rep. 830 (Tex.)

1 Cooper *v.* Young, 22 Ga. 269; 68 Am. Dec. 512; Foard *v.* R. Co., 8 Jones, 235; 78 Am. Dec. 277; Mather *v.* Ex. Co., 138 Mass. 55; 52 Am. Rep. 258; Waite *v.* Gilbert, 10 Cush. 177; Nettles *v.* R. Co., 7 Rich. 190; 62 Am. Dec. 409; Hamlin *v.* R. Co., 1 H. & N. 408; Hansley *v.* R. Co., 20 S. E. Rep. 528 (N. C.).

2 Galena etc. R. Co. *v.* Rae, 18 Ill. 488; 68 Am. Dec. 574; Houston etc. R. Co. *v.* Smith, 63 Tex. 322; Mich. etc. R. Co. *v.* Carter, 13 Ind. 164.

3 Browne Carr. § 689; Crouch *v.* R. Co. 25 L. J. Ex. 137; Bell *v.* R. Co., 4 L. T. (N. S.) 293; Goddard *v.* R. Co., 57 Me. 202.

4 Murdock *v.* R. Co., 133 Mass. 15; Quimby *v.* Vanderbilt, 17 N. Y. 306; Houston etc. R. Co. *v.* Hill, 63 Tex. 381; 51 Am. Rep. 642; Georgia R. Co. *v.* Hayden, 71 Ga. 518; 51 Am. Rep. 274; Hamlin *v.* R. Co., 1 H & N. 408; Ill. etc. R. Co. *v.* Demars, 44 Ill. 292.

not carrying the passenger to his destination, the latter is entitled to recover compensation for the inconvenience, loss of time and expense of reaching there by other means,[1] because, "if a carrier engages to put a person down at a given place, and does not put him down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to the place of destination somehow or other. If there are means of conveyance for getting there, he may take those means, and make the carrier responsible for the expense; but if there are no means, the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated."[2]

But it is not the necessary consequence, or the probable consequence, that the person riding in another vehicle to his destination will suffer an injury on it,[3] or walking to his destination, there being no other means of carriage at hand, will contract a cold or other illness or injury,[4] and therefore, for damages of this kind, the carrier cannot be held liable, because "it is not the necessary consequence; it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold."[5]

1 Laws. Rights, Rem. & Pr., § 2635; Trigg *v.* R. Co., 74 Mo. 147; Penn. R. Co. *v.* Aspell, 23 Pa. St. 147; 62 Am. Dec. 323; Hamlin *v.* R. Co., 5 H. & N. 408; Indianapolis etc. R. Co. *v.* Birney, 71 Ill. 391; The Zenobia, 1 Atl. Adm. 80; The Canadian, 1 Brown. Adm. 11; Porter *v.* The New England, 17 Mo. 290; Benson *v.* New Jersey Transp. Co., 9 Bosw. 412; Yonge *v.* Pacific Mail Steam. Co., 1 Cal. 353.

2 Hobbs *v.* R. Co., L. R. 10 Q. B. 111.

3 Hobbs *v.* R. Co., *supra.*

4 Hobbs *v.* R. Co., *supra;* Trigg *v.* R. Co., 74 Mo. 147; Francis *v.* St. Louis etc. Co., 5 Mo. (App.) 7; Murdock *v.* R. Co., 133 Mass. 15; Cinn. etc. R. Co. *v.* Eaton, *post*; Indianapolis etc. R. Co. *v.* Birney, 71 Ill. 391.

5 Hobbs *v.* R. Co., *supra.* But see Williams *v.* Vanderbilt, 28 N. Y. 217; 84 Am. Dec. 333, where the passenger was to be carried from New York to California via Nicaragua, and through the negligence of the carrier he was detained there. In an action for the breach of the carrier's contract damage was allowed for sickness contracted while waiting on the isthmus since such, on account of the natural unhealthiness of that land,

Nor in such an action can the passenger recover for mental pain and anxiety of mind.[1]

§ 347. **In Actions of Tort.**—But as we have also seen, it is a duty of a carrier, as well as an implied contract upon his part, on his receiving a passenger either with or without a ticket, to carry; and if he fails to do so in consequence of negligence or misconduct upon his own part, or upon that of his servants, he will be liable to an action at the instance of the person injured, which may either be in assumpsit on the implied contract for safe conveyance, or in case, as for the tort. Therefore, if the action is in tort for negligently leaving a passenger at some place not his destination, it is held that recovery may be had for illness brought on by the passenger walking to his destination;[2] or for fright, occasioned by his being chased by dogs on the road,[3] for it is well settled that one who commits a trespass or other wrong is liable for all the damage which legitimately flows directly from such trespass or wrong, whether the specific damage might have been foreseen by the wrongdoer or not.[4]

The measure of damages in actions of tort for personal injuries not causing death, includes compensation for bodily and mental pain and suffering,[5] both up to

must have been within the contemplation of the parties as a result of such a detention.

1 Walsh *v.* R. Co., 42 Wis. 23; 24 Am. Rep. 376; Trigg *v.* R. Co., 74 Mo. 147.

2 Brown *v.* R. Co., 54 Wis. 342; 41 Am. Rep. 41, 11 N. W. Rep. 356, 911, where the passenger was a woman and the exertion brought on a miscarriage and sickness. Internat. etc. R. Co. *v.* Terry, 62 Tex. 380; 50 Am. Rep. 529; Cinn. etc. R. Co. *v.* Eaton, 94 Ind. 474; 48 Am. Rep. 179; Murdock *v.* R. Co., 133 Mass. 15; Lake Erie etc. R. Co. *v.* Fox, 88 Ind. 381; Yorton *v.* R. Co., 62 Wis. 367; 21 N. W. Rep. 516; 23 Id. 401; Drake *v.* Kiely, 93 Pa. St. 492. *Contra*, Pull. Pal. Car Co. *v.* Barker, 4 Colo. 344; 34 Am. Rep. 89, criticised in Brown *v.* R. Co., *supra*.

3 Cinn. etc. R. Co. *v.* Eaton, *ante*.

4 See cases cited in Brown *v.* R. Co., 54 Wis. 342; 41 Am. Rep. 41; 11 N. W. Rep. 356, 911; Brown *v.* R. Co., 66 Mo. 588; Drake *v.* Kiely, 93 Pa. St. 492; Balt. etc R. Co. *v.* Kemp, 61 Md. 74.

5 See cases in next note and Lawson, Rights, Rem. & Pr., § 1218; McKinley *v.* R. Co., 44 Ia. 314; Morse *v.* R. Co., 10 Barb. 621; Ohio etc. R. Co. *v.* Dickerson, 59 Ind. 317; Whalen *v.* R. Co., 60 Mo. 323;

the bringing of the suit and which it is reasonably certain must necessarily occur in the future;[1] compensation for loss of earnings since the injury, and for loss of future earning power;[2] compensation for expenses of medical treatment and nursing, either paid for or which the passenger is under an obligation to pay,[3] and for other expenses necessarily following the injury.[4]

In a husband's suit for injuries to the wife, his damages are compensation for the loss of her society and services, and the necessary expenses of her medi-

Ransom *v.* R. Co., 15 N. Y. 415; Illinois etc. R. Co. *v.* Stables, 62 Ill. 313; Porter *v.* R. Co., 71 Mo. 66; Jones *v.* The Cortez, 17 Cal. 487; 79 Am. Dec. 142; Muldowney *v.* R. Co., 36 Ia. 462; Fairchild *v.* Cal. Stage Co., 13 Cal. 599. Whether mental anguish where there is no bodily injury—such, for example, as arises from the indignity of ejection from a train without violence—is an element of *compensatory* damages, is disputed. In a Nevada case afterwards overruled it is said: "How can such damages be estimated in money? The mental agony of a timid woman would be entirely different from that of a bold man. No two cases could be weighed in like scales. To properly estimate such a cause of damage, the door must be opened to the realms of philosophy, physiology, and psychology." In Thompson on Carriers it is said that "the same remarks would apply to damages awarded for bodily pain. That injuries done can have no adequate redress in money, or that damages may be difficult of estimation, is no reason why pecuniary relief may not be granted as a compensation," § 23, citing the following cases as holding the affirmative of the proposition, McKinley *v.* R. Co., 44 Ia. 314; Chicago etc. R. Co. *v.* Flagg, 43 Ill. 364; Craker *v.* R. Co., 36 Wis. 657; Ransom *v.* R. Co., 15 N. Y. 415; Sherley *v.* Billings, 8 Bush, 147; Paine *v.* R. Co., 45 Iowa, 569; Hamilton *v.* R. Co., 53 N. Y. 25; *s. c.* 48 How. Pr. 50; Coleridge, J., in Blake *v.* R. Co., 18 Q. B. 93; Masters *v.* Warren, 27 Conn. 293; Seger *v.* Burkhamsted, 22 Conn. 290; Canning *v.* Williamstown, 1 Cush. 451. See *contra*, Johnson *v.* Wells, 6 Nev. 224 (overruled in Quigley *v.* R. Co., 11 Nev. 350); Smith *v.* R. Co., 23 Ohio St. 10. And see Allen *v.* Camden etc. Steam. Co., 46 N. J. L. 198.

1 Hopkins *v.* R. Co., 36 N. H. 9; Dale *v.* R. Co., 1 Hun, 141; Klein *v.* Jewett, 26 N. J. Eq. 474; Memphis etc. R. Co. *v.* Whitfield, 44 Miss. 466; Curtis *v.* R. Co., 20 Barb. 282, 18 N. Y. 534; Caldwell *v.* Murphy, 1 Duer, 233, 11 N. Y. 416; Matteson *v.* R. Co., 62 Barb. 364; Holyoke *v.* R. Co., 48 N. H. 541; Black *v.* R. Co., 10 La. Ann. 33; Frink *v.* Schroyer, 18 Ill. 416; Strohm *v.* R. Co., 96 N. Y. 365; Delie *v.* R. Co., 51 Wis. 400; 8 N. W. Rep. 265; Fry *v.* R. Co., 45 Ia. 416; Pitts. etc. R. Co. *v.* Andrews, 39 Md. 329; McDonald *v.* R. Co., 26 Ia. 124.

2 Phillips *v.* R. Co., 4 Q. B. Div. 406; Penn. R. Co. *v.* Books, 57 Pa. St. 339; McKinley *v.* R. Co., 44 Ia. 314; Wade *v.* Leroy, 20 How. 34; Walker *v.* R. Co., 63 Barb. 260. But if the occupation in which he is engaged is an unlawful one, the loss of it is no ground for damages, no matter how lucrative it may have been. Jacques *v.* R. Co., 41 Conn. 61; 19 Am. Rep. 483.

3 Patt. Ry. Acc. L., § 393.

4 The Canadian, 1 Brown's Adm. 11; Ind. etc. R. Co. *v.* Birney, 71 Ill. 391; Francis *v.* St. Louis Trans. Co., 5 Mo. App. 7.

cal treatment;[1] if the suit is by the wife for personal injuries to herself, these, however, are not recoverable, but only the physical injury done to her can be regarded.[2] Where the suit is by parent or master for injury to a child or servant, the measure of damage is compensation for loss of service during the minority of the child or the period of service and the necessary expenses of medical treatment.[3]

The law makes it incumbent upon the plaintiff to use ordinary care, and take all reasonable measures within his knowledge and power to avoid the loss, and render the consequences as light as may be; and it will not permit him to recover for such losses as by such care and means might have been prevented.[4] But it does not affect the damages, or benefit the carrier that the passenger had been insured against the accident, and had received the benefit of his insurance;[5] or that he had received the benefit of a charitable subscription made for him;[6] or that his employer continued to pay him his salary, notwithstanding his disability.[7]

But the defendant's act must have been the proximate cause of the injury. Thus, in one case, the plaintiff, a passenger, was carried beyond his station on a dark night, and on alighting, was misinformed by the conductor as to where he was, but being ac-

1 Patt. Ry. Acc. L., § 398, citing King *v.* Thompson, 87 Pa. St. 365; Penn. R. Co. *v.* Goodman, 62 Pa. St. 329; Pack *v.* Mayor, 3 Comst. 489; Neir *v.* R. Co., 12 Mo. (App.) 35; Cregin *v.* R. Co., 83 N. Y. 595.

2 Patt. Ry. Acc. L., § 398, citing *inter alun* Balt. etc. R. Co. *v.* Kemp, 61 Md. 74; Fuller *v.* R. Co., 21 Conn. 557; Klein *v.* Jewett, 26 N. Y. 474; Tuttle *v.* R. Co., 42 Ia. 518.

3 Patt. Ry. Acc. L., § 399, citing Penn. R. Co. *v.* Kelly, 31 Pa. St. 372; Frick *v.* R. Co., 75 Mo. 542; Smith *v.* R. Co., 55 Mo. 556; St. Louis etc. R. Co. *v.* Freeman, 36 Ark. 41.

4 Klutts *v.* R. Co., 75 Mo. 642; Santer *v.* R. Co., 66 N. Y. 50; Lyons *v.* R. Co., 57 N. Y. 489; Allender *v.* R. Co., 37 Ia. 264; Gulf etc. R. Co. *v.* Coon, 69 Tex. 730; 7 S. W. Rep. 492; Owens *v.* R. Co., 35 Fed. Rep. 715; Nashville etc. R. Co. *v.* Smith, 6 Heisk. 174.

5 Harding *v.* Towshend, 43 Vt. 576; 5 Am. Rep. 304; Bradburn *v.* R. Co., L. R. 10 Ex. 1; Balt. etc. R. Co. *v.* Wightman, 29 Gratt. 431.

6 Norristown *v.* Mayer, 67 Pa. St. 356.

7 Ohio etc. R. Co. *v.* Dickerson, 59 Ind. 317; McLaughlin *v.* Corry, 77 Pa. St. 109; 18 Am. Rep. 432.

quainted with the neighborhood, he soon discovered his mistake. If he had alighted where he was told he was, it was his intention to follow the track and cross a culvert, but he pursued his way, intending to cross another culvert which he fell into and was hurt. The carrier was held not liable.[1] In another, through a collision of trains, a passenger was injured, and becoming thereby disordered in mind as well as body some eight months after, committed suicide. "His insanity," said Mr. Justice Miller, "as a cause of his final destruction, was as little the natural and probable result of the negligence of the railroad officials, as his suicide, and each of these are casual and unexpected causes, intervening between the act which injured him and his death."[2]

It is always a difficult thing to compute what is a proper amount to allow a plaintiff who has suffered a personal injury. As Mr. Browne[3] puts it, unlike goods a man has not a cost price and a marketable value, and in many cases the injuries done may be irreparable by any money payment. What amount of money, for example, can be compensation for the loss of an eye, or for the loss of both legs? The jury must be left to decide the matter, and with their verdict the court will not interfere merely because they may think that if they had been on the jury they would have given more or less, as the case may be;[4] on the

1 Lewis *v.* R. Co. 54 Mich. 55; 52 Am. Rep. 790; 19 N. W. Rep. 744; Henry *v.* R. Co., 76 Mo. 288; 43 Am. Rep. 762. But where an aged woman was put off at night, at a station which was neither open nor lighted, and where there was no one to give her information as to where she might obtain shelter, and she wandered away from the depot in search of the highway, and returning, about an hour afterwards, fell down a flight of steps on the premises, it was held that it was proper to submit the question to the jury whether the absence of light at the depot or of a person to give her information was the proximate cause of the injury. Patten *v.* R. Co., 32 Wis. 524.

2 Scheffer *v.* R. Co., 15 Otto. 249.

3 Carr. § 708.

4 Phillips *v.* R. Co., L. R., 5 C. P. Div. 282; Danville etc. R. Co. *v.* Stewart, 2 Met. (Ky.) 122; McKinley *v.* R. Co., 44 Ia. 322; 24 Am. Rep. 748; Maher *v.* R. Co., 67

other hand, the courts will interfere where the damages allowed by the jury are so manifestly unjust and disproportionate as to show that the jury have been misled either by passion, prejudice, partiality, or misapprehension.[1]

Where the injuries cause death, the statutes authorizing such actions in many of the States, limit the amount of recovery, and expressly declare the persons for whose benefit they may be prosecuted.

§ 348. **Exemplary or Punitive Damages.**—What are called exemplary, punitive, vindictive damages, or "smart money," may be awarded by the jury in cases of fraud, malice, such negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, willfulness, or other causes of aggravation in the act or omission causing injury. They are inflicted beyond the compensation to which the plaintiff is entitled, as a punishment to the wrongdoer, and as an example to others;[2] and corporations

N. Y. 52; Chicago etc. R. Co. *v.* Pondrom, 51 Ill. 333; Montgomery etc. R Co. *v.* Boring, 51 Ga. 582; Whalen *v.* R. Co., 60 Mo. 323; Farish *v.* Reigle, 11 Gratt. 697.

1 Terre Haute etc. R. Co. *v.* Vanatta, 21 Ill. 188; Graham *v.* R. Co., 66 Mo. 536; Union Pacific R. Co. *v.* Hand, 7 Kan. 380; Missouri etc. R. Co. *v.* Weaver, 16 Kan. 456; New Orleans etc., Co. *v.* Hurst, 36 Miss. 660; New Orleans etc. R. Co. *v.* Statham, 42 Miss. 607; Du Laurans *v.* R. Co., 15 Minn. 49; Georgia etc. R. Co. *v.* McCurdy, 45 Ga. 288; Montgomery etc. R. Co. *v.* Boring, 51 Ga. 582; Collins *v.* R. Co., 12 Barb. 492; Clapp *v.* R. Co., 19 Barb. 461; Farish *v.* Reigle, 11 Gratt. 697; Chicago etc. R. Co. *v.* Griffin, 68 Ill. 499; Pullman etc. Co. *v.* Reed, 75 Ill. 125; Chicago etc. R. Co. *v.* McKean, 40 Ill. 218; Mobile etc. R. Co. *v.* Ashcraft, 48 Ala. 15; Central R. Co. *v.* Smith, 76 Ga. 209; 2 Am. St. Rep. 31; Ill. etc. R. Co. *v.* Cunningham, 67 Ill. 316.

2 Laws. Rights, Rem. & Pr., § 1219; Ill. etc. R. Co. *v.* Welch, 52 Ill. 184; Murphy *v.* R. Co., 29 Conn. 496; Edelman *v.* St. Louis Trans. Co., 3 Mo. (App.) 503; Heirn *v.* McCaughan, 32 Miss. 17; New Orleans etc. R. Co. *v.* Hurst, 36 Miss. 660; Graham *v.* R. Co., 66 Mo. 536; New Orleans etc. R. Co. *v.* Statham, 42 Miss. 607; Peck *v.* Neil, 3 McLean 22; Penn. R. Co. *v.* Books, 57 Pa. St. 339; Caldwell *v.* New Jersey Steam. Co. 47 N. Y. 282; Chicago etc. R. Co. *v.* Williams, 55 Ill. 185; The Amiable Nancy, 3 Wheat. 546; Day *v.* Woodworth, 13 How. 363; Railroad Co. *v.* Quigley, 21 How. 202; Milwaukee etc. R. Co. *v* Arms, 91 U. S. 489; Railway Co. *v.* Humes, 115 U. S. 512; Barry *v.* Edmunds, 116 Id. 550; Railway Co. *v.* Harris, 122 Id. 609; Railway Co. *v.* Beckwith, 129 Id. 26. If the employees of a railroad willfully, recklessly, or capriciously fail to stop a train when signalled, exemplary damages are recoverable. Wilson *v.* R. Co., 63 Miss. 352.

are no more exempt than individuals in this respect.[1] It is held in the United States Supreme Court, and in a few States, that a railroad is not liable to punitive damages, because its servant's conduct on the train was wanton and oppressive, unless it is shown that he was known to the company to be an unsuitable person, or that it participated in, approved or ratified his treatment of the passenger[2]—this on the ground that such damages being awarded as punishment to the offender, and to prevent the repetition of the wrong conduct, require that the guilty intent shall be that of the defendant, and not that of his agent or servant. In other States such direct authorization or subsequent ratification is not necessary, because the corporation "can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu*, under conditions of such peril and subordination; the whole power and authority of the corporation, *pro hac vice*, is vested in these officers, and, as to passengers on board, they are to be considered as the corporation itself; and the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers, the corporation being responsible for the acts of the officers in the conduct and government of the train, to the

[1] Thomp. Carr. Pass. § 575, citing Malecek *v.* R. Co., 57 Mo. 17; Graham *v.* R. Co., 66 Mo. 536; Pitts. etc. R. Co. *v.* Slusser, 19 Ohio St. 151; Allenton etc. R. Co. *v.* Dunn, 19 Ohio St. 162; Caldwell *v.* N. J. Steam. Co., 47 N. Y. 282.

[2] Lake Shore etc. R. Co. *v.* Prentice, 147 U. S. 141; New Orleans etc. R. Co. *v.* Allbritton, 38 Miss. 242; Hagan *v.* R. Co., 3 R. I. 88; Milwaukee etc. R. Co. *v.* Finney, 10 Wis. 388 (overruled in Craker *v.* R. Co., 36 Wis. 657); Turner *v.* R. Co., 34 Cal. 594; Ackerson *v.* R. Co., 32 N. J. L. 254, 260; Doss *v.* R. Co., 59 Mo. 27. Retaining the servant in the service of the corporation is evidence of ratification. Perkins *v.* R. Co., 55 Mo. 201; Graham *v.* R. Co., 66 Mo. 536; Goddard *v.* R. Co., 57 Me. 202; Cleghorn *v.* R. Co., 56 N. Y. 44; Hagan *v.* R. Co., 3 R. I. 88.

passengers traveling by it, as the officers would be for themselves if they were themselves the owners of the road and train."[1]

§ 349. **Measure of Damages.—Telegraph Companies.** —It was in an action against a telegraph company that the rule as to the measure of damages for breach of a contract was so concisely stated by Earl, J., which rule has been adopted by me in my work on Contracts:[2] "The damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. * * * A party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts."[3] Remembering that as between the sender and receiver of a telegraph message, any loss occasioned by a change in its terms, or a non-de-

1 Bass *v.* R. Co., 36 Wis. 450; Hanson *v.* R. Co., 62 Me. 84; Chicago etc. R. Co. *v.* Herring, 57 Ill. 59; Jeff. etc. R. Co. *v.* Rogers, 38 Ind. 116; Balt. etc. R. Co. *v.* Blocker, 27 Md. 277; Quigley *v.* R. Co., 11 Nev. 350; Hopkins *v.* R. Co., 36 N. H. 9; Railroad Co. *v.* Dunn, 19 Ohio St. 162; Louisville etc. R. Co. *v.* Whitman, 79 Ala. 328; Goddard *v.* R. Co., 57 Me. 202, the court saying: "It is our judgment, therefore, that actions against corporations for the willful and malicious acts of their agents and servants in executing the business of the corporation should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is the most needed."

2 Laws. Contr. § 462.

3 Leonard *v.* Tel. Co., 41 N. Y. 544; 1 Am. Rep. 447; and see True *v.* Tel. Co., 60 Me. 9; 11 Am. Rep. 156; West. U. Tel. Co. *v.* Graham, 1 Col. 230; 9 Am. Rep. 136; Squire *v.* Tel. Co., 98 Mass. 232; 93 Am. Dec. 157; Smith *v.* Tel. Co., 83 Ky. 104; 4 Am. St. Rep. 127; Cannon *v.* Tel. Co., 100 N. C. 300; 6 Am. St. Rep. 590; 6 S. E. Rep. 731.

livery within a reasonable time, through the negligence of the telegraph company, falls upon him who chose that means of communication, and thereby made the company his agent;[1] the measure of damages in the large majority of cases, is not hard to arrive at, in actions by the person damaged against the company.

If the message offers to sell one horse, the company, through its agent, knows that if when it is delivered it reads one hundred horses, the party will be damaged to the extent of having to deliver ninety-nine horses, which he may or may not own, but which he did not intend to offer to sell, and the same result would follow if it were an offer to buy instead of to sell.[2] So, if the message offers to buy or sell a thing at a certain price, it is presumed to know that if the price is changed in transmission, the party will be damaged in so far as he will be obliged to sell at a cheaper or buy at a higher price than he intended;[3] as where wheat was ordered to be purchased at "22," and the message, as delivered, said "25";[4] where the message offered to sell apples at $1.75 per barrel, and as delivered, it stated $1.55 as the price per barrel.[5] So, if a message directs an agent to buy certain goods they (the company's agents), should know that if the

1 Ayer *v.* Tel. Co., 79 Me. 493; 1 Am. St. Rep. 353; 10 Atl. Rep. 495; Laws. Contr. §§ 20, 21, 22.

2 Marr *v.* Tel. Co., 85 Tenn. 529; Washington etc. Tel. Co. *v.* Hobson, 15 Gratt. 122. So where a dispatch ordering "one shawl," when delivered, read "100 shawls." Bowen *v.* Tel. Co., 1 Am. Law Reg. 685. Where it read, "two hand bouquets," but, as delivered read "200 bouquets." New York etc. Tel. Co. *v.* Dryburg, 3 Phila. 408; 35 Pa. St. 298; 78 Am. Dec. 338. Where it read an order for 5,000 "sacks" of salt, but was delivered as calling for 5,000 "casks." Leonard *v.* Tel. Co., 41 N. Y. 544; 1 Am. Rep. 448. Where 100 shares of stock were ordered to be sold, and the message when delivered ordered 1,000 to be sold. Tyler *v.* Tel. Co., 60 Ill. 421; 14 Am. Rep. 38. Where 10,000 bushels of corn were ordered to be shipped, and the message when delivered said "1,000" bushels. Bartlett *v.* Tel. Co., 62 Me. 209; 16 Am. Rep. 437. Where as sent it read, "Cover 200 September and 100 August," and delivered it read "Cover 200 September and 200 August." West. U. Tel. Co. *v.* Blanchard, 68 Ga. 299; 45 Am. Rep. 480.

3 West. U. Tel. Co. *v.* Shotter, 71 Ga. 760.

4 De Rutte *v.* New York Tel. Co., 1 Daly, 547; 30 How. Pr. 403.

5 West. U. Tel. Co. *v.* Du Boise, 128 Ill. 248; 21 N. E. Rep. 4.

message is not delivered at all or delayed, the plaintiff's damage will be the difference between what he would have had to pay if his message had been delivered in time, and what he had to pay afterwards, if the goods meanwhile go up in value.[1] If the message offers another a salaried position, or accepts an offer of such a kind, they must know that a failure to deliver correctly will lose the one a position or the other the services of a person he desires.[2] And the same would be true of a message engaging the services of a professional man,[3] or directing the action of an attorney in the plaintiff's case.[4] If the message is from a creditor to his attorney telling him to attach the property of his debtor, they should know that if they do not deliver the message, the creditor will lose his security and his debt.[5] Where they are called upon to transmit a market report, they should know that their delivery of an incorrect copy will injure the receiver, whether he be seller or buyer, who relies upon the report.[6]

In all these cases the damages are but the direct and natural result of the failure to deliver properly, and the defendant cannot plead that he had no reason

1 U. S. Tel. Co. *v.* Wenger, 55 Pa. St. 262; 93 Am. Dec. 751; Hadley *v.* West. U. Tel. Co., 115 Ind. 191; 15 N. E. Rep. 845; True *v.* Int. Tel. Co., 60 Me. 9; 11 Am. Rep. 156; Landsberger *v.* Tel. Co., 32 Barb. 530; and see Sprague *v.* West. U. Tel. Co., 6 Daly, 200; 67 N. Y. 590; Manville *v.* West. U. Tel. Co., 37 Iowa, 214; 18 Am. Rep. 8; De Rutte *v.* New York etc. Tel. Co., 1 Daly, 547; 30 How. Pr. 403; Davis *v.* Tel. Co., 1 Cin. Rep. 100; Parks *v.* Tel. Co., 13 Cal. 422; 73 Am. Dec. 589; Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744; 6 Am. Rep. 165; West. U. Tel. Co. *v.* Brown, 58 Tex. 170; 44 Am. Rep. 610; West. U. Tel. Co. *v.* Graham, 1 Col. 230; 9 Am. Rep. 136.

2 West. U. Tel. Co. *v.* Valentine, 18 Ill. App. 57; West. U. Tel. Co. *v.* McKibben, 114 Ind. 511; 14 N. E. Rep. 844; West. U. Tel. Co. *v.* Fenton, 52 Ind. 1; see Merrill *v.* West. U. Tel. Co., 78 Me. 97; 2 Atl. Rep. 84.

3 West. U. Tel. Co. *v.* Longwell, 21 Pac. Rep. 339 (Utah).

4 Sprague *v.* West. U. Tel. Co., 6 Daly, 200; 67 N. Y. 590.

5 Parks *v.* Alta Cal. Tel. Co., 13 Cal. 422; 93 Am. Dec. 589; West. U. Tel. Co. *v.* Sheffield, 71 Tex. 570; 10 Am. St. Rep. 570; 10 S. W. Rep. 752.

6 Turner *v.* Hawkeye Tel. Co., 41 Ia. 458; 20 Am. Rep. 605.

to anticipate such a result, because the message, on its face, has sufficiently informed him.[1]

If the message on its face has no meaning at all, or where it is in cipher, and has therefore only a hidden meaning, and the company has no further knowledge, here through its agent, it will be presumed to know that its non-delivery will at least damage the party to the extent of his having thrown away the money he paid for it, and therefore, the price paid for its transmission is recoverable at any rate.[2] Yet, beyond this, according to the weight of authority, no special damages are recoverable, because in such a case they could not "reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."[3] Contrary to this reasoning, there are a respectable number of cases in

[1] And see Leonard *v.* N. Y. etc. Tel. Co., 41 N. Y. 544; 1 Am. Rep. 446; Rittenhouse *v.* Tel. Co., 44 N.Y. 263; 4 Am. Rep. 673; Sprague *v.* West. U. Tel. Co., 6 Daly, 200; 67 N. Y. 590; Baldwin *v.* American Tel. Co., 1 Daly, 575; De Rutte *v.* New York, A. & B. Tel. Co., 1 Daly, 547; Mowry *v.* West. U. Tel. Co., 51 Hun, 126; U. S. Tel. Co. *v.* Wenger, 55 Pa. St. 262; 93 Am. Dec. 751; Marr *v.* West. U. Tel. Co., 85 Tenn. 529; Pepper *v.* Tel. Co., 87 Tenn. 554; 10 Am. St. Rep. 699; Washington & N. O. Tel. Co. *v.* Hobson, 15 Gratt. 122; Lane *v.* Mont. Tel. Co., 7 U. C. C. P. 23; Parks *v.* Alta Cal. Tel. Co., 13 Cal. 422; 73 Am. Dec. 589; West. U. Tel. Co. *v.* Graham, 1 Col. 230; 9 Am. Rep. 136; West. U. Tel. Co. *v.* Blanchard, 68 Ga. 299; 45 Am. Rep. 480; West. U. Tel. Co. *v.* Shotter, 71 Ga. 760; Tyler *v.* West. U. Tel. Co., 60 Ill. 421; 14 Am. Rep. 38; 74 Ill. 168; 24 Am. Rep. 279; West. U. Tel. Co. *v.* Du Bois, Ill. 1889; West. U. Tel. Co. *v.* Valentine, 18 Ill. App. 57; West. U. Tel. Co. *v.* Harris, 19 Ill. App. 347; West. U. Tel. Co. *v.* Fenton, 52 Ind. 1; Hadley *v.* West. U. Tel. Co., 115 Ind. 191; Manville *v.* West. U. Tel. Co., 37 Iowa, 214; 18 Am. Rep. 8; Turner *v.* Hawkeye Tel. Co., 41 Iowa, 458; 20 Am. Rep. 605.

[2] Cases in next note.

[3] Mackay *v.* Tel. Co., 16 Nev. 222; Behm *v.* Tel. Co., 8 Biss. 131; Candee *v.* Tel. Co., 34 Wis. 471; 17 Am. Rep. 452; Daniel *v.* Tel. Co., 61 Tex. 452; 48 Am. Rep. 305; West. U. Tel. Co. *v.* Martin, 9 Ill. App. 587; United States Tel. Co. *v.* Gildersleve, 29 Md. 232; 96 Am. Dec. 519; Cannon *v.* Tel. Co., 100 N. C. 300; 6 Am. St. Rep. 590; 6 S. E. Rep. 731; Beaupre *v.* Tel. Co., 21 Minn. 155; Landsberger *v.* Tel. Co., 32 Barb. 530; Baldwin *v.* Tel. Co., 45 N. Y. 744; 6 Am. Rep. 135; Sanders *v.* Stuart, L. R. I. C. P. D. 326; McColl *v.* Tel. Co., 44 N Y. 487; West. U. Tel. Co. *v.* Wilson, 32 Fla. 527; 14 South. Rep. 1, overruling West. U. Tel. Co. *v.* Hyer, 22 Fla. 637; 1 Am. St. Rep. 222; 1 South. Rep. 129; Primrose *v.* Tel. Co., 154 U. S. 1; 14 S. C. Rep. 1098. Where by statute the company is liable in damages for failing to transmit a dispatch, a company failing altogether to deliver a cipher dispatch is liable: Western Union Tel. Co. *v.* Reynolds, 77 Va. 173; 46 Am. Rep. 715.

which it is held that the company is liable for transmitting incorrectly a cipher dispatch, whose meaning was unknown to the operator, to the same extent as though the message was written in the ordinary way, and its meaning known to him.[1] The telegraph company, it is argued in support of this doctrine, has not a scale of charges higher or lower as the importance of the dispatch is great or small, as the common carrier has in the transportation of goods. It cannot be said, then, that for this reason the operator should be informed of its importance, when it makes no difference in the charge of transmission. It is not shown that, if its importance is disclosed to the operator, he is required, by the rules of the company, to send the message out of the order in which it comes to the office, with reference to other messages awaiting transmission; that he is to use any extra degree of skill, any different method or agency for sending it, from the time, the skill used, the agencies employed, or the compensation demanded for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which, in consideration thereof, he had agreed to perform, and which the law, in consideration of his promise, and the reception of the consideration therefor, had already enjoined on him.[2]

1 Daugherty *v.* Tel. Co., 75 Ala. 168; 51 Am. Rep. 435; West. U. Tel. Co. *v.* Way, 83 Ala. 542; 4 South. Rep. 844; West. U. Tel. Co. *v* Blanchard, 68 Ga. 299; 45 Am. Rep. 480; West. U. Tel. Co. *v.* Fatman, 73 Ga. 285; 54 Am. Rep. 877; West. U. Tel. Co. *v.* Reynolds, 77 Va. 173; 46 Am. Rep. 715; Hart *v.* Tel. Co., 66 Cal. 579; 55 Am. Rep. 119; 6 Pac. Rep. 637.

2 West. U. Tel. Co. *v.* Hyer, 22 Fla. 637; 1 Am. St. Rep. 222; 1 South. Rep. 129.

The sender of a message has a right to use abbreviations in common use, and the language of merchants and business men, in telegraphing their orders, replies and contracts; and telegraph operators will be presumed to understand these things which they ought to know to properly conduct the business.[1] Thus, in one case where the message read: "Buy 50 Northwestern—50 Prairie du Chien, limit 45";[2] in another where it read: "Car cribs six sixty, c. a. f., prompt;"[3] in another where it read: "Cover 200 September, 100 August";[4] in another where it read: "10 cars new two whites Aug. shipment, fifty-six half";[5] in another where it read: "Sell 100 Western Union answer price";[6] it was held that the agents of the company had sufficient knowledge from the face of the message to apprise them of its importance. This question is fully discussed in an Illinois case,[7] where the message read: "Buy in addition to 1,000 August, 1,000 cheapest month. Put stop order on 5,000 Dec. at 17 cents," and there was evidence that the company, from previous transactions, ought to have understood the meaning of the message. "All the cases," said the Court, "which hold that a telegraph company is not liable for consequential damages for a failure to transmit a dispatch as received, on the ground of indefiniteness or obscurity, in the language of the message, do so upon the ground that unless the agent of the company may reasonably know from the message itself, or is

1 2 Thomp. Neg., § 856; Hadley *v.* West. U. Tel. Co., 115 Ind. 191; 15 N. E. Rep. 845; Manville *v.* West. U. Tel. Co., 37 Iowa 214; 18 Am. Rep. 8; True *v.* Internat. Tel. Co., 60 Me. 9; 11 Am. Rep. 156; Rittenhouse *v.* Tel. Co., 44 N. Y. 263; 4 Am. Rep. 673; Mowry *v.* Tel. Co., 51 Hun. 126.

2 United States Tel. Co. *v.* Wenger, 55 Pa. St. 262; 93 Am. Dec. 751.

3 Pepper *v.* West. U. Tel. Co., 87 Tenn. 554; 10 Am. St. Rep. 699; 1 S.W. Rep. 783.

4 West. U. Tel. Co. *v.* Blanchard, 68 Ga. 299; 45 Am. Rep. 480.

5 West. U. Tel. Co. *v.* Harris, 19 Ill. App. 347, 353.

6 Tyler *v.* West. U. Tel. Co., 60 Ill. 421; 14 Am. Rep. 38.

7 Postal Tel. Co. *v.* Lathrop, 131 Ill. 575; 23 N. E. Rep. 583.

informed by other means, that it relates to a matter of business importance, he cannot be supposed to have contemplated damages as a result from his failure to send it as written, as in the case of cipher dispatches. The Supreme Court of Wisconsin, in *Candee* v. *Telegraph Co.*,[1] say: 'The operator who receives and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling and unimportant character.' It is clear enough that, applying the rule in *Hadley* v. *Baxendale*, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers, it is wholly unintelligible and nonsensical. An operator would, therefore, be justifiable in saying it contains no information of value as pertaining to a business transaction, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss. The messages in this case, however, are not cipher dispatches. Their language is plain and intelligible to every one who can read, so far as they purport to disclose the business to which they relate. They are abbreviations, and clearly indicate that they relate to business transactions between the sender and the sendee. The first message, 'Please buy in addition to one thousand August, one thousand cheapest month,' was notice to the agent at Chicago that appellees were ordering the agent in New York to purchase merchandise for them. We

[1] 34 Wis. 472.

do not agree with counsel in saying that it might as well be construed to be an order 'for a thousand of toothpicks or a thousand papers of pins as anything else.' Every one of intelligence knows that such articles are not purchased in that way. Suppose, however, that the agent was not informed as to the quantity, quality, and value of the merchandise to be purchased by the message, would that justify him in contemplating, within the rule in *Hadley* v. *Baxendale*, no damages as a result of his negligence or omission of duty in promptly and correctly sending it forward? It certainly cannot be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram, which are known by the parties themselves, to make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility in the commercial world. It is not easy to state a case in which it can be said the parties contemplated, at the time of contracting, all the damages which will probably result from a failure to perform the contract. We think the reasonable rule, and one well sustained by authority, is that where a message as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused. Under this rule, both dispatches as presented to appellant's operator were sufficiently explicit to charge it with the

loss sustained by appellees, resulting from what has been found by the jury to be its inexcusable mistakes."

It is not necessary that the agents of the company should see on the face of the dispatch the exact amount of pecuniary loss which will result from its non-delivery.[1] In a Texas case,[2] where the message, as given to the operator read: "You had better come and attend to your claim at once," the Court said: "The message indicated, with reasonable certainty to the telegraph operator the facts,—1. The plaintiff had a claim of some pecuniary nature; 2. That the claim should be attended to at Jefferson; 3. That the matter was urgent, 'at once'; and 4. Loss would probably follow want of such attention, which might be prevented by obeying the call made in the dispatch. This was sufficient to disclose that the object was to enable plaintiffs to attend to a claim due them, and that loss might result from a failure to transmit the message with promptness." In another case,[3] E, who had purchased a flock of sheep, which he wished to drive to his ranch, directed a telegram to a servant to meet him at a certain place and "bring Shep" (meaning a sheep-dog on the ranch). The message was delivered so as to read "bring sheep." The servant accordingly drove E's sheep from the ranch to meet him. E, when he sent the dispatch, informed the agent in charge of the office that he wanted the dog to assist in driving the sheep on his ranch. "Where," said the Court, "notice of the main fact was given, we think the defendant was chargeable with notice of every incidental fact that would attend the transaction that it could then have ascertained by the most minute inquiry.

1 Pepper *v.* West. U. Tel. Co., 87 Tenn. 554; 10 Am. St. Rep. 699; 11 S. W. Rep. 783; Manville *v.* West. U. Tel. Co., 37 Ia. 214; 18 Am. Rep. 8.

2 West. U. Tel. Co. *v.* Sheffield, 71 Tex. 570; 10 Am. St. Rep. 790; 10 S. W. Rep. 752.

3 West. U. Tel. Co. *v.* Edsall, 12 S. W. Rep. 41 (Tex.).

Notice of the main purpose was sufficient to put it upon inquiry as to the attendant details, and it is chargeable with all it could have learned by such inquiries. This rule enforced in all cases, is emphatically applicable to telegraph companies. The condensed methods of expression in use in their business requires them to take notice of whatever the dispatch suggests, and if they need fuller information on the subject they should seek it, and if they do not do so, they must be held, as we have suggested, to have all the knowledge that such inquiries could have elicited. In this case, knowledge of the fact that the two herds were to be driven between known points, at a stated season of the year, would properly charge the company sufficiently with notice of the distances, character of the country, expense of driving, and effect of delay on the sheep, considering the weather and other things incident to driving flocks of sheep over the routes, to make it responsible for damages growing out of such causes or conditions."

But where there is nothing on the face of the message or in the information given by the sender to the operator, from which it can be inferred that any special loss will result from its non-delivery, the company is not liable for such special damages.[1] Nor, as in other cases, is the company liable for any remote damages, *i. e.*, damages not the natural and proximate result of its neglect.[2] Thus, where A telegraphed to B to send

1 Baldwin *v.* U. S. Tel. Co., 45 N. Y. 774; 6 Am. Rep. 165; Landsberger *v.* Magnetic Tel. Co., 32 Barb. 530.

2 West. U. Tel. Co. *v.* Hall, 124 U. S. 444; West. U. Tel. Co. *v.* Graham, 1 Col. 230; 9 Am. Rep. 136; Hadley *v.* West. U. Tel. Co., 115 Ind. 191; First Nat. Bank of Barnesville *v.* Tel. Co., 30 Ohio St. 555; 27 Am. Rep. 485; Reliance Lumber Co. *v.* West. U. Tel. Co., 58 Tex. 394; 44 Am. Rep. 620; Hubbard *v.* West. U. Tel. Co., 33 Wis. 558; 14 Am. Rep. 775; West. U. Tel. Co. *v.* Crall, 39 Kan. 580; Smith *v.* West. U. Tel. Co., 83 Ky. 104; 4 Am. St. Rep. 126; Squire *v.* West. U. Tel. Co., 98 Mass. 232; 93 Am. Dec. 157; Landsberger *v.* Magnetic Tel. Co., 32 Barb. 530; McColl *v.* West. U. Tel. Co., 44 N. Y. Sup. Ct., 487; 7 Abb. N. C. 151; Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744; 6 Am. Rep. 165; Lowery *v.* West. U. Tel. Co., 60 N. Y. 198; 19 Am. Rep. 154; Pegram *v.* West.

him $500, and the message, as delivered, asked for $5,000, which B sent and A absconded with, it was held that the company was not responsible to B,[1] the Court saying: "The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant. The cause of the loss was the criminal act of A, conceived and executed after the defendant had ceased to have any relation to the money." So, where the telegraph company inaccurately transmitted a message ordering a race-horse of C, to be sent to a certain place, and, owing to the mistake in the telegram, the horse was sent to another place, and could not be entered for the races, it was held that C could not recover for the loss of the prize purses which the horse might have won had he been present at the races.[2] Nor, as the last case shows, are mere speculative or contingent profits, which might have accrued to the plaintiff had the message been properly delivered, recoverable.[3]

Unless the plaintiff proves special injury or actual damage, he can recover nominal damages only,[4] except where a penalty is imposed by statute for the failure to transmit or deliver a message intrusted to it, in which case the amount of the penalty may be recovered,

U. Tel. Co., 100 N. C. 28; 6 Am. St. Rep. 57; 6 S. E. Rep. 770; First Nat. Bank *v.* Tel. Co., 30 Ohio St. 555; 27 Am. Rep. 485; Bodkin *v.* West. U. Tel. Co., 31 Fed. Rep. 134.

1 Lowery *v.* Tel. Co., 60 N. Y. 198; 19 Am. Rep. 154.

2 West. U. Tel. Co. *v.* Crall, 39 Kan. 580; 18 Pac. Rep. 719.

3 Clay *v.* West. U. Tel. Co., 6 S. E. Rep. 813 (Ga.); Beaupre *v.* Pacific etc. Tel. Co., 21 Minn. 155; Breese *v.* U. S. Tel. Co., 45 Barb. 275; 48 N. Y. 132; 8 Am. Rep. 526; Hubbard *v.* West. U. Tel. Co., 33 Wis. 558; 14 Am. Rep. 775; Tel. Co. *v.* Graham, 1 Col. 230; 9 Am. Rep. 136; Squire *v.* West. U. Tel. Co., 98 Mass. 232; 93 Am. Dec. 157; True. *v.* Internat. Tel. Co., 60 Me. 9; 11 Am. Rep. 156; McColl *v.* West. U. Tel. Co., 7 Abb. N. C. 151; Kinghorne *v.* Mont. Tel. Co., 18 U. C. Q. B. 60; Lane *v.* Mont. Tel. Co., 7 U. C. C. P. 75.

4 Little Rock etc. Tel. Co. *v.* Davis, 41 Ark. 79; Clay *v.* West. U. Tel. Co., Ga. 1888; Cutts *v.* Western Union Tel. Co., 71 Wis. 46; West. U. Tel. Co. *v.* Hall, 124 U. S. 444; 8 S. C. Rep. 577; Pennington *v.* West. U. Tel. Co., 67 Ia. 631; 56 Am. Rep. 367; 24 N. W. Rep. 45; 25 Id. 838.

without alleging or proving any actual damage.[1] Exexemplary damages are recoverable where there is such willful or gross negligence on the part of the agents of the company, as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message.[2]

§ 350. **Damages for Mental Suffering.—Recoverable in Texas and Other States.**—In an early edition of Shearman and Redfield on Negligence, it is said:[3] "In case of delay or total failure of delivery of messages, related to matters not connected with business, such as personal or domestic matters, we do not think the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of injury to the feelings, which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages." No authority was cited by the learned authors, as no case had then been reported, in which the question had been presented to a court of last resort.

A case arose, however, in Texas in 1881, *So. Relle* v. *Western Union Telegraph Company.*[4] It was alleged here that the telegraph company neglected to deliver a message sent to the plaintiff, in these words: "Your mother is dead; come on night train," whereby he was prevented from attending her funeral, and damages were claimed for the injury caused to his feelings thereby.

1 Little Rock etc. Tel. Co. *v.* Davis, 41 Ark. 79; West. U. Tel. Co. *v.* Buchanan, 35 Ind. 429; 9 Am. Rep. 744.

2 West *v.* Western Union Tel. Co., 39 Kan. 93; 7 Am. St. Rep. 530; 17 Pac. Rep. 807; Gulf etc. R. Co. *v.* Levy, 59 Tex. 542; 46 Am. Rep. 269.

3 § 605 (1880).

4 55 Tex. 308; 40 Am. Rep. 805; Logan *v.* West. U. Tel. Co., 84 Ill. 468, was earlier but the precise question did not arise there.

The Supreme Court held that this was a proper element of damages, the Court saying that the natural consequence of the failure to deliver such a message, was to produce a keen sense of grief incident to a disappointment; that the company must have contemplated such a result, as its importance and the relationship appeared on the face of the message; that such damages were general damages recoverable under a general averment of damage, but that juries should be cautioned in such cases, to distinguish between the regret and disappointment caused by the neglect of the company, and the grief caused the plaintiff by the death of his parent or other relative. Two years later this case was apparently overruled,[1] but the doctrine announced was reiterated in 1886,[2] and is now well-settled in that State.[3]

The Texas doctrine is followed in Alabama, where

1 Gulf etc. R. Co. *v.* Levy, 59 Tex. 563; 46 Am. Rep. 278.

2 Stuart *v.* Tel. Co., 66 Tex. 580; 59 Am. Rep. 623; 18 S. W. Rep. 351.

3 Loper *v.* West. U. Tel. Co., 70 Tex. 689; 8 S. W. Rep. 600; W. U. Tel. Co. *v.* Cooper, 71 Tex. 507; 9 S. W. Rep. 598; W. U. Tel. Co. *v.* Broesche, 72 Tex. 654; 10 S. W. Rep. 734; W. U. Tel. Co. *v.* Simpson, 73 Tex. 432; 11 S. W. Rep. 385; W. U. Tel. Co. *v.* Adams, 75 Tex. 531; 12 S. W. Rep. 857; W. U. Tel. Co. *v.* Feegles, 12 S. W. Rep. 860; W. U. Tel. Co. *v.* Jones, 81 Tex. 271; 16 S. W. Rep. 1006; W. U. Tel. Co. *v.* Rosentreter, 80 Tex. 406; 16 S. W. Rep. 25; Erie Tel. etc. Co. *v.* Grimes, 82 Tex. 89; 17 S. W. Rep. 831; W. U. Tel. Co. *v.* Nations, 82 Tex. 539; 18 S. W. Rep. 709; W. U. Tel. Co. *v.* Lydon, 82 Tex. 364; 18 S. W. Rep. 701; W. U. Tel. Co. *v.* Beringer, 84 Tex. 38; 19 S. W. Rep. 336; W. U. Tel. Co. *v.* Erwin, 19 S. W. Rep. 1002; W. U. Tel. Co. *v.* Carter, 20 S. W. Rep. 834; W. U. Tel. Co. *v.* Wisdom, 20 S. W. Rep. 56; W. U. Tel. Co. *v.* Berdine, 21 S. W. Rep, 982; W. U. Tel. Co. *v.* Stephens, 21 S. W. Rep. 148; W. U. Tel. Co. *v.* Evans, 1 Tex. Civ. App. 298; 21 S. W. Rep. 266; W. U. Tel. Co. *v.* Piner, 21 S. W. Rep. 315; W. U. Tel. Co. *v.* McLeod, 22 S. W. Rep. 998; W. U. Tel. Co. *v.* Linn, 23 S. W. Rep. 895; W. U. Tel. Co. *v.* Zane, 25 S. W. Rep. 722; W. U. Tel. Co. *v.* Clark, 25 S. W. Rep. 990; W. U. Tel. Co. *v.* Jobe, 25 S. W. Rep. 1036; W. U. Tel. Co. *v.* Wingate, 25 S. W. Rep. 439; W. U. Tel. Co. *v.* Linn, 26 S. W. Rep. 490; W. U. Tel. Co. *v.* Porter, 26 S. W. Rep. 866; W. U. Tel. Co. *v.* Kendzora, 26 S. W. Rep. 245; W. U. Tel. Co. *v.* Hill, 26 S. W. Rep. 252; W. U. Tel. Co. *v.* May, 27 S. W. Rep. 760; W. U. Tel. Co. *v.* Dejarles, 27 S. W. Rep. 792. These cases are cited by W. C. Rodgers, Esq., in an able article on this topic in 29 Am. Law Rev. 209. Mr. Rodgers argues with great ability and clearness on the side of the Texas doctrine, and his reasons seem conclusive of the question. See, also, West. U. Tel. Co. *v.* Piner, 29 S. W. Rep. 66; West. U. Tel. Co. *v.* O'Keefe, 29 S. W. Rep. 1137; West. U. Tel. Co. *v.* Kinsley, 23 S. W. Rep. 831; West. U. Tel. Co. *v.* Womack, 29 S. W. Rep. 932; West. U. Tel. Co. *v.* Russell, 31 S. W. Rep. 698.

the message read: "How is ma. Answer at once";[1] in Indiana, where the message read: "My wife is very ill; not expected to live";[2] in Kentucky, where the message was to a son, and announced the illness, death, and time of funeral of his father;[3] in North Carolina, where the message was to the husband, "Come in haste; your wife is at the point of death";[4] in Tennessee, where the message read: "Your brother is in a dying condition";[5] in a case in the Federal Court, where the message read: "Dell is worse. Come at once. Sister Annie";[6] and in Iowa,[7] where the message read: "Mother dead, funeral Wednesday."[8]

In some of these cases, the action was by the sender who had paid for the message; in others by the sendee,

1 West. U. Tel. Co. *v.* Cunningham, 14 South. Rep. 579; and see West. U. Tel. Co. *v.* Henderson, 7 South. Rep. 419.

2 Reese *v.* West. U. Tel. Co., 123 Ind. 294; 24 N. E. Rep. 163; West. U. Tel. Co. *v.* Stratemeier, 39 N. E. Rep. 527.

3 Chapman *v.* West. U. Tel. Co., 13 S. W. Rep. 880.

4 Young *v.* West. U. Tel. Co., 107 N. C. 370; 11 S. E. Rep. 1044; and see Thompson *v.* West. U. Tel. Co., 106 N. C. 549; 11 S. E. Rep. 269; Thompson *v.* West. U. Tel. Co., 107 N. C. 449; 12 S. E. Rep. 427; Sherrill *v.* West. U. Tel. Co., 21 S. E. Rep. 429.

5 Wadsworth *v.* West. U. Tel. Co., 86 Tenn. 695; 6 Am. St. Rep. 864; 8 S. W. Rep. 574.

6 Beasley *v.* West. U. Tel. Co., 39 Fed. 182.

7 See Curtis *v.* R. Co., 54 N. W. Rep. 339, an action against a carrier of passengers.

8 Mentzer *v.* West. U. Tel. Co., 62 N. W. Rep. 1 (Ia.), a very exhaustive discussion of the question in the course of which the court say: "Of the text writers: Shearm. & R. Neg. p. 692, § 605; Thomp. Electr. § 379; 3 Suth. Dam. §§ 971–980, inclusive; 2 Sedg. Dam. § 894, and others hold that such damages may be recovered, while Wood's Mayne Dam. p. 74; Cooley, Torts, 271,—and others seem to deny it. The general rule which has come down to us from England, no doubt, is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages. See Lynch *v.* Knight, 9 H. L. Cas. 577; Hobbs *v.* Railroad Co., L. R. 10 Q. B. 122. And doubtless this is the rule of law today in all ordinary actions, either ex contractu or ex delicto. But it must be remembered that there are exceptions to the rule, and that the telegraph, as a means of conveying intelligence, is comparatively a new invention. The general rule above referred to was adopted long before the electric current was harnessed and made subservient to the will of man. One of the crowning glories of the common law has been its elasticity, and its adaptability to new conditions and new states of fact. It has grown with civilization, and kept pace with the march of events, so that it is as virile to-day, in our advanced state of civilization, as it was when the race was emerging from the dark ages of the past. Should it ever fail to be adjustable to the new conditions which age and experience bring, then its usefulness is over, and a new social compact must be entered into."

the message having been sent at his request; in others, the sendee was the plaintiff, and no contract relation growing out of any request to the sender, could be shown.

The Texas doctrine has the proper limitation, viz., that the company must have, either from the message itself or otherwise, notice of the near relationship of the parties, and the gravity of the case, otherwise the company has no reason to believe that any mental suffering will result from its failure, and even if it arises from its neglect, such damages will be too remote.[1] In a recent case,[2] the telegram read: "To W. E. Coffin, Tyler, Tex.: A. Bracken will be buried to-morrow. Come at once. Answer. J. M. Knight." Coffin and Bracken were brothers-in-law, and very intimate friends. The message was not delivered, and Coffin was unable to attend the funeral. But it was held that he could not recover for mental anguish, the court saying: "That husband and wife, parent and child, and brothers and sisters, may recover under the principles before announced, is settled by the decisions of this and other courts which have agreed with the decisions made in this State on that subject. To what degree of remote relationship the inference of injury may be extended, is not necessary for us to determine at this time, but it is evident that there may be blood relations so far removed that no such presumption could be indulged by the jury. The right to recover, however, for such injuries, cannot, upon principle, be placed upon kinship; that affects only the questions of notice and proof of injury. The right of the plaintiff to recover, and the liability of the telegraph company

1 West. U. Tel. Co. *v.* Brown, 71 Tex. 723; McAllen *v.* West. U. Tel. Co., 70 Tex. 243; 7 S. W. Rep. 715; West. U. Tel. Co. *v.* Fore, 26 S. W. Rep. 783; 10 S. W. Rep. 1023; West. U. Tel. Co. *v.* McMillan, 30 S. W. Rep. 298.

2 West. U. Tel. Co. *v.* Coffin, 30 S. W. Rep. 896 (Tex.).

to respond in damages in such cases, depends upon the general rules of law applicable to all classes of breach of contracts", viz., what was in contemplation between the parties as the natural result of a breach." And the court continued: "It being settled that mental anguish constitutes actual damages, for which a recovery may be had in this class of cases, without concurring physical injury, our decisions are in harmony with, and logically follow from, the general rule laid down and universally approved. To illustrate the application of these general principles by our court in this class of cases, and to show the points wherein this case is not embraced in the rule or in our decision heretofore rendered, we will suppose that Coffin was the father of the deceased. In such case, upon the delivery of the message, the telegraph company must have taken notice of the relationship between the parties, and, from the language of the message, must have known that the purpose of sending it was to enable him to be present at the burial; therefore, that a failure to deliver the message would probably deprive him of being so present. It must, also, from a knowledge of the laws of human nature, common to all, have known that such failure to be present at the funeral would cause mental suffering, because this is a common result from such a state of case. The injury in such case is the natural result of a failure to deliver the message, and must have been in the 'contemplation of the parties when the contract' for transmission was made. The facts showing liability being proved, the jury might infer the fact of mental anguish, because such is recognized as a common result under such circumstances; no proof would be required to show that mental suffering did ensue. In the case under consideration, the tender relations alleged to have existed on the part

of plaintiff towards deceased was a special condition of things, not known to be usual between brothers-in-law; and, in order to make the defendant liable for the injury arising out of these special circumstances, notice must have been given to it when the telegram was delivered for transmission. In order, therefore, for the plaintiff to have recovered in this case, he must have proved that, at the time the message was delivered to it, the telegraph company was notified of the relations existing between him and the deceased; otherwise the company would be regarded as only having in contemplation such results as would follow in the usual course of things when brothers-in-law are thus concerned, and not to have contemplated that degree of anguish which would exist in case of a brother. Neither could the jury infer mental anguish from the fact of relationship of brother-in-law, or that of friend, or upon proof of the existence of these tender ties between them, for there is no recognized common rule that the dearest friends suffer such anguish on like occasions. No doubt, cases do exist in which the suffering of a friend is as great as that of a brother under like circumstances, but it is not the common and known result. There being neither proof of notice to the telegraph company of the special circumstances, nor of the actual suffering by plaintiff, the judgment was unauthorized by the proof."

In another case, a father sent a telegram to an officer in another county, in these words: "My daughter, A., has run off with R. She is only 15 years old. Issue no license for them." The company negligently delayed the message until after the license was issued, and the ceremony performed. The court held that the father could recover damages for his mental distress caused by the marriage being an unsuitable one, but not for

that of his wife, because this was not within the contemplation of the parties, there being no evidence that the company knew he had a wife.[1] And it can never be within the contemplation of the parties that mental suffering will result where no real cause for it is able to be shown. Thus, where a son, away from home, wrote to his mother for money and she sent it by telegraph, but it was not delivered, it was held that neither the mother nor the son could recover damages for sufferings of this character. As to the mother's claim, the court said: "It is true that plaintiff alleges that her son was an inexperienced youth; was without means at an hotel in Poughkeepsie, N. Y.; had written to her for money; and she was anxious to have it transmitted to him. It is not shown that he was in any danger, or that there was any real cause for mental suffering, humiliation, or even inconvenience. The fact that a loving mother, in the dark hours of midnight, may conjure up a thousand forebodings of evil to her distant boy, when he is in no real danger, even of losing a single hour's repose, may furnish trouble enough to her; yet it gives no solid basis for damages in a practical business transaction.[2] And in regard to the son's suit, the court said: "It could not have been within the reasonable contemplation of the parties that appellant was so morbidly sensitive as to suffer great mental anguish and fear of being looked upon with suspicion, for the simple reason that he did not receive a remittance of money promptly. If so, every debtor who fails to pay his grocery bills promptly might be subject to the same measure of damages, because his grocer happened to be a morbidly sensi-

1 West. U. Tel. Co. *v.* Proctor, 25 S. W. Rep. 811.

2 Ricketts *v.* West. U. Tel. Co., 30 S. W. Rep. 1105, citing Rowell *v.* West. U. Tel. Co., 75 Tex. 26; 12 S. W. Rep. 534.

tive man, who might suffer humiliation, anxiety and mental torture because his own bills were left unpaid, and others might look upon him with suspicion and distrust."[1]

§ 351. **The Texas Doctrine Denied in Some States.** —On the other hand, in Mississippi,[2] Kansas,[3] Dakota,[4] Georgia,[5] Florida,[6] Minnesota,[7] Missouri,[8] and in the Federal Courts in several circuits,[9] it is held that damages cannot be recovered for mental anguish or suffering.

§ 352. **Arguments For and Against the Texas Doctrine.** —The arguments against the recovery of damages for mental suffering are, 1st., that they have been allowed in only three classes of cases, (a) where a physical injury has been sustained, in which event the physical and the mental suffering cannot be separated (b) in actions for breach of contract of marriage, and (c) in cases of willful wrong affecting the liberty, character, reputation, personal security or domestic relations of the party injured, and that courts should not extend these exceptions; 2d, that damages for mental suffering are difficult to estimate or assess; and 3d, that undesirable and frequent litigation would follow the allowance of damages of this kind.

The first argument is substantially this, that because certain rules have been established to meet the condi-

1 De Voegler *v.* West. U. Tel. Co., 30 S. W. Rep. 1107.

2 West. U. Tel. Co. *v.* Rogers, 9 South. Rep. 823.

3 West *v.* West. U. Tel. Co., 39 Kas. 95; 17 Pac. Rep. 807.

4 Russell *v.* West. U. Tel. Co., 3 Dak. 315; 19 N. W. Rep. 408.

5 Chapman *v.* West. U. Tel. Co., 88 Ga. 763; 15 S. E. Rep. 901.

6 West. U. Tel. Co. *v.* Saunders, 14 South. Rep. 148; one judge dissenting.

7 Francis *v.* West. U. Tel. Co., 59 N. W. Rep. 1078, one judge being of opinion that there should be some remedy.

8 Connell *v.* West. U. Tel. Co., 116 Mo. 34; 22 S. W. Rep. 153.

9 West. U. Tel. Co. *v.* Wood, 57 Fed. Rep. 471; Clare *v.* West. U. Tel. Co., 44 Fed. Rep. 554; Crawson *v.* West. U. Tel. Co., 47 Fed. Rep. 544; Tyler *v.* West. U. Tel. Co., 54 Fed. Rep. 471; and see Butner *v.* West. U. Tel. Co., 37 Pac. Rep. 1087 (Okl.).

tions then existing, they should not be extended even under altered conditions. A conclusive reply it would seem to this argument is, that the telegraph company is a modern agency, and new doctrines must necessarily be evolved to meet the exigencies of the new state of affairs. It is a public agent, and if it violates its duty to the injury of another, the injured person should not be denied a remedy. It is as much obliged to carry a message announcing the illness or death of a near relative, as it is one making an offer to buy a load of hay, or a house. A rule of law which says that senders of the latter class of messages may recover the damages they suffer, while those of the former class cannot, gives to the one a privilege which seems unjust and illogical. Its duty is to transmit and deliver promptly and accurately, so far as care and diligence on its part can effect this, and where this is omitted, it should answer for the injury resulting, whether to the pocket book or to the feelings, provided only that the injury is the natural and direct consequence of the negligent act.

In answer to the second argument, it is enough to say that the courts, though formerly considerably fettered by this fear, are now uniformly opposed to the idea that because it is difficult to ascertain the exact amount of compensation which ought to be made for an injury necessarily resulting from the wrongful act of another, it is a sufficient reason why any compensation should be refused.[1] And this argument might be urged with precisely the same force in all those cases where mental and bodily suffering combined are treated as proper elements of damage.

The third argument certainly comes with poor grace from the judges of tribunals established for

[1] Lawson, Contr., § 461.

the very purpose of giving compensation to the sufferers of injuries at the hands of others. How can it be "intolerable" for a citizen to seek in a court of justice a remedy for a wrong? And as for the fear of frequent litigation, it should be remembered that a telegraph company is not an insurer, and that suits will hardly be more frequent than its acts of negligence, its breaches of duty, and of contract. "If the rule opens up a vast and fruitful field of litigation, it is only because telegraph companies fail to do their duty. We cannot think that a rule which will tend to make telegraph companies more careful in the matter of delivering their messages, will be fraught with such fearful results as counsel imagine. The single, plain duty of a telegraph company, is to make transmission and delivery of messages entrusted to it, with promptitude and accuracy. When that is done, its responsibility is ended. When it is omitted, through negligence, the company should answer for all injury resulting, whether to the feelings or the purse, one or both, subject to the proviso that the injury must be the natural and direct consequence of the negligent act. We cannot conceive of any danger in such a rule. It seems to us to be in accord with the enlightened spirit of modern jurisprudence."[1]

The law concerning the duties and liabilities of telegraph companies, may be said to be yet in its infancy; it can hardly be expected, at this early day in its history, to be settled in all its parts by a line of concurring decisions, but it is believed that the Texas doctrine, founded, as it seems to be, on principles of right and justice will ultimately prevail.[2]

[1] Mentzer *v.* West. U. Tel. Co., *ante.*

[2] See Thomp. on Electricity, Art. V., §§ 378-393.

TABLE OF CASES CITED.

The References are to Sections.

A.

Abbe *v.* Eaton, 166.
Abberger *v.* Martin, 211.
Abbott *v.* Nat. S. S. Co., 182.
Abbott *v.* R. Co., 296.
Abraham *v.* Nunn, 40.
Abraham *v.* Tel. Co., 317.
Abrams *v.* R. Co., 137, 142.
Achtenhagen *v.* Watertown, 341.
Ackerson *v.* R. Co., 348.
Ackley *v.* Finch, 51.
Ackley *v.* Kellogg, 127.
Adams *v.* Carlisle, 341.
Adams *v.* Clark, 215.
Adams *v.* Clem, 78.
Adams *v.* New Orleans Steam Co., 85.
Adams *v.* O'Connor, 15, 68.
Adams *v.* R. Co., 308.
Adams Ex. Co. *v.* Blankenstein, 206.
Adams Ex. Co. *v.* Cressap, 83.
Adams Ex.Co. *v.* Darnell, 201.
Adams Ex.Co. *v.* Egbert, 344.
Adams Ex.Co. *v.* Fendrick, 137, 166.
Adams Ex.Co. *v.* Guthrie, 137, 336.
Adams Ex. Co. *v.* Harris, 109, 157.
Adams Ex. Co. *v.* Haynes, 139, 149.
Adams Ex. Co. *v.* Holmes, 142.
Adams Ex. Co. *v.* King, 148, 149.
Adams Ex. Co. *v.* Loeb, 339.
Adams Ex. Co. *v.* Nock, 137, 140, 149, 152, 153, 154, 335.
Adams Ex. Co. *v.* Reagan, 137, 158.
Adams Ex. Co. *v.* Schier, 149.
Adams Ex. Co. *v.* Sharpless, 139, 148.
Adams Ex. Co. *v.* Stettaners, 137, 139, 142, 149, 334.
Adams Ex. Co. *v.* Wilson, 106.
Adriatic, The, 160, 338.
Adsit *v.* Brady, 330.
Aetna Ins. Co. *v.* Wheeler, 101, 104, 105, 109.
Agnew *v.* Johnson, 54, 57.
Agnew *v.* The Contra Costa, 86, 123.
Aigen *v.* R. Co., 103.
Aiken *v.* R. Co., 103.
Aiken *v.* Tel. Co., 317, 318, 319.
Ainsworth *v.* Bowen, 66.
Alair *v.* R. Co., 142.
Alabama &c. R. Co. *v.* Kidd, 22.
Ala. &c. R. Co. *v.* Mount Vernon Co., 106.
Ala. &c. R. Co. *v.* Thomas, 101, 137.
Ala. &c. R. Co. *v.* Little, 137, 142.
Ala. &c. R. Co. *v.* Yarborough, 266.
Albin *v.* Presby, 77.
Albright *v.* Penn, 84, 123.
Alden *v.* Pearson, 16, 337, 338.
Alden *v.* R. Co., 232.
Aldrich *v.* R. Co., 9, 40, 47.
Aldridge *v.* R. Co., 101.
Alesia, The, 162.
Alexander *v.* Greene, 83, 85, 139, 162.
Alexandria R. Co. *v.* Burke, 62, 65.
Aline, The, 162, 178.
Allen *v.* Camden &c. Steam Co., 347.
Allen *v.* Dykers, 61.
Allen *v.* Ham, 27.
Allen *v.* R. Co., 210, 232.
Allen *v.* Sackrider, 49, 83.
Allen *v.* Sewall, 95.
Allen *v.* Smith, 74.
Allen *v.* Willard, 341.
Allender *v.* R. Co., 227, 309, 312, 347.
Allenton &c. R. Co. *v.* Dunn, 348.
Allerton *v.* R. Co., 229.
Alling *v.* R. Co., 271, 273.
Allyn *v.* R. Co., 341.
Alt *v.* Weidenburg, 27.
America, The, 162.
Am. Contract Co. *v.* Cross, 272.
Am. Ex. Co. *v.* Baldwin, 201.
Am. Ex. Co. *v.* Haggard, 200.
Am. Ex. Co. *v.* Haire, 205.
Am. Ex. Co. *v.* Hackett, 201.
Am. Ex. Co. *v.* Hockett, 84.
Am. Ex. Co. *v.* Lesem, 185, 205.
Am. Ex. Co. *v.* Milk, 206.
Am. Ex. Co. *v.* Perkins, 133.
Am. Ex. Co. *v.* Robinson, 201.
Am. Ex. Co. *v.* Sands, 139, 142, 338.
Am. Ex. Co. *v.* Schier, 185, 201.
Am. Ex. Co. *v.* Second Nat. Bank, 101, 103, 139, 148, 337.
Am. Ex. Co. *v.* Smith, 130, 214.
Am. Ex. Co. *v.* Spellman, 156.
Am. Ex. Co. *v.* Stack, 206.
Am. Ex. Co. *v.* Wolf, 201.
Am. Rapid Tel. Co. *v.* Conn. Tel. Co., 323.
Am. Steam. Co. *v.* Bryan, 289.

The References are to Sections.

Am. Steam Co. *v.* Landreth, 232.
Am. Trans. Co. *v.* Moore, 137, 156, 335.
Amerine *v.* Porteous, 329.
Ames *v.* Belden, 13.
Ames *v.* Jordan, 301.
Ames *v.* Palmer, 26, 215.
Amiable Nancy, The, 348.
Amies *v.* Stevens, 129.
Anchor Line *v.* Dater, 137.
Anderson *v.* R. Co., 265, 341.
Andrews *v.* R. Co., 272, 306.
Andrews *v.* Richmond, 8.
Andrews *v.* Scotten, 53.
Androscoggin R. Co. *v.* Auburn Bank, 9.
Angle *v.* R. Co., 106
Angus *v.* Dickerson, 42.
Annas *v.* R. Co., 137, 248, 249.
Anonymous *v.* Jackson, 136.
Antoinette C., The, 166, 338.
Appleton *v.* Donaldson, 52.
Arbuckle *v.* Thompson, 211.
Arcade Hotel Co. *v.* Wiatt, 74, 76.
Archer *v.* The Adriatic, 170.
Archer *v.* Walker, 13.
Archibald *v.* Argall, 59.
Ardan S. S. Co. *v.* Thebaud, 163, 181.
Arend *v.* Liverpool S. S. Co., 160, 170, 172.
Arendale *v.* Morgan, 59.
Arent *v.* Squire, 47.
Arians *v.* Brickley, 27.
Arkansas &c. R. Co. *v.* Canman, 266.
Armentrout *v.* R. Co., 125.
Armett *v.* Foster, 294.
Armfield *v.* Humphrey, 47.
Armistead *v.* Wilde, 79, 80.
Armory *v.* Delamirie, 15.
Armory *v.* McGregory, 345.
Armstrong *v.* R. Co., 234.
Arnold *v.* Hallenbake, 84.
Arnold *v.* Jones, 123.
Arnold *v.* Nat. S. S. Co., 201.
Arnold *v.* R. Co., 139, 157, 248, 266.
Arnot *v.* Braconnier, 332.
Arrowsmith *v.* R. Co., 296.
Ash *v.* Savage, 51.
Ashendon *v.* R. Co., 142.
Ashmore *v.* Penn. Steam Co., 85, 137, 162.
Ashton *v.* Atlantic Bank, 57.
Ashton *v.* R. Co., 308.
Ashton's Appeal, 57.
Aston *v.* Heaven, 232.
Astrup *v.* Lewy, 166.
Atchison &c. R. Co. *v.* Brewer, 285, 334.
Atchison &c. R. Co. *v.* Cochran, 292.
Atchison &c. R. Co. *v.* Denver &c. R. Co., 101.
Atchison &c. R. Co. *v.* Gants, 244, 268.
Atchison &c. R. Co. *v.* Johns, 230.
Atchison &c. R. Co. *v.* Roach, 101, 105.
Atchison &c. R. Co. *v.* Washburn, 86, 137.
Atchison &c. R. Co. *v.* Weber, 267.
Atkinson *v.* Bell, 8.
Atkinson *v.* Manks, 23.
Atkinson *v.* R. Co., 295.
Atlanta &c. R. Co. *v.* Texas Grate Co., 103.
Atlantic &c. R. Co. *v.* Ayers, 304.
Atlantic &c. R. Co. *v.* Condor, 298.
Atlantic &c. R. Co. *v.* Dunn, 298.
Atty. Gen. *v.* Edison Tel. Co., 323.
Atwater *v.* Mower, 51.
Atwater *v.* Sawyer, 73.
Atwood *v.* Reliance Trans. Co., 139.
Audenried *v.* R. Co., 95.
Auerbach *v.* R. Co., 242.
Augusta &c. R. Co. *v.* Renz, 306.
Aurentz *v.* Porter, 5, 44.
Aurora Branch R. Co. *v.* Grimes, 341.
Austin *v.* R. Co., 219, 225.
Austin *v.* Seligman, 8.
Austin *v.* Talk, 170.
Avinger *v.* R. Co., 89.
Aycrigg *v.* R. Co., 297.
Ayer *v.* Tel. Co., 319, 320, 342, 349.
Ayers *v.* R. Co., 195.
Aymar *v.* Astor, 166.
Ayre *v.* South Australian Banking Co., 68.
Ayres *v.* R. Co., 86, 89, 154, 162.
Ayres *v.* Western Co., 137, 140.

B.

Babcock *v.* Herbert, 84.
Babcock *v.* Lawson, 70.
Babcock *v.* Murphy, 40.
Babcock *v.* R. Co., 101, 107, 108, 109.
Backhouse *v.* Sneed, 123.
Backus *v.* Start, 47.
Badlam *v.* Tucker, 51, 55, 65.
Bailey *v.* Colby, 21, 22.
Bailey *v.* Quint, 26.
Bailey *v.* R. Co., 301.
Bailey *v.* Shaw, 214.
Bainbridge *v.* Firmstone, 34.
Baird *v.* Daly, 49.
Baird *v.* R. Co., 152.
Baker *v.* Arnot, 66.
Baker *v.* Brinson, 139, 338.
Baker *v.* Dessauer, 76.
Baker *v.* R. Co., 86, 115, 137.
Baker *v.* Roberts, 8.
Baker *v.* Woodruff, 8.
Bakewell *v.* Talbott, 33.
Baldwin *v.* Am. Ex. Co., 84, 201.
Baldwin *v.* Bradley, 53.
Baldwin *v.* Collins, 137, 142, 143.
Baldwin *v.* Tel. Co., 317, 320, 321, 342, 349.
Balfe *v.* West, 10.
Ball *v.* Liney, 19, 23.
Ball *v.* R. Co., 137, 162.
Ballentine *v.* R. Co., 97, 120.
Ballou *v.* Farnum, 295, 296.
Baltimore, *v.* Marroft, 341.
Baltimore Ins. Co. *v.* Dalrymple, 53, 63, 64.
Baltimore Packet Co. *v.* Smith, 271.
Balt. &c. R. Co. *v.* Blocher, 262, 298, 348.

The References are to Sections.

Balt. &c. R. Co. *v.* Brady, 143, 335, 338.
Balt. &c. R. Co. *v.* Brown, 160.
Balt. &c. R. Co. *v.* Campbell, 240, 291,
Balt. &c. R. Co. *v.* Davis, 131.
Balt. &c. R. Co. *v.* Depew, 230.
Balt. &c. R. Co. *v.* Harris, 291.
Balt. &c. R. Co. *v.* Jones, 312.
Balt. &c. R. Co. *v.* Kemp, 347.
Balt. &c. R. Co. *v.* Leafley, 269, 312.
Balt. &c. R. Co. *v.* Leonhardt, 307.
Balt. &c. R. Co. *v* McDonald, 260, 267.
Balt. &c. R. Co. *v.* McWhinney, 191.
Balt. &c. R. Co. *v.* Noell, 340.
Balt. &c. R. Co. *v.* Pumphrey, 209.
Balt. &c. R. Co. *v.* Rathbone, 137, 162.
Balt. &c. R. Co. *v.* Schumacher, 107.
Balt. &c. R. Co. *v.* Schwindling, 230.
Balt. &c. R. Co. *v.* Scott, 158.
Balt. &c. R. Co. *v.* Sewell, 344.
Balt. &c. R. Co. *v.* Skeels, 137.
Balt. &c. R. Co. *v.* State, 234, 312, 340.
Balt. &c. R. Co. *v.* Swan, 340.
Balt. &c. R. Co. *v.* Whitacre, 341.
Balt. &c. R. Co. *v.* Wightman, 231, 340, 347.
Balt. &c. R. Co. *v.* Wilkens, 115.
Balt. &c. R. Co. *v.* Wilkinson, 306.
Balt. &c. R. Co. *v.* Worthington, 340.
Balt. &c. Steam Co. *v.* Smith, 288.
Bamberg *v.* R. Co., 86.
Banacouta, The, 338.
Bancroft *v.* Merchants Dis. Co., 109.
Bancroft *v.* Peters, 213.
Bancroft *v.* R. Co., 102.
Banfield *v.* Haeger, 23.
Banfield *v.* Whipple, 42.
Bank *v.* Guelmartin, 76.
Bank *v.* Marshall, 58.
Bank *v.* R. Co., 63.
Bank of America *v.* McNeil, 70.
Bank of Baldwin *v.* R. Co., 115.
Bank of Kentucky *v.* Adams Ex. Co., 84, 137, 160, 162.
Bank of New Orleans *v.* Tel. Co.,321.
Bank of Oswego *v.* Doyle, 22.
Bank of Rochester *v.* Jones, 51.
Bank of Rutland *v.* Woodruff, 59, 65.
Bankard *v.* R. Co., 338, 339.
Bansemer *v.* R. Co., 201, 202.
Barber *v.* Essex, 341.
Barclay *v.* Clide, 201.
Barden *v.* R. Co., 307.
Bardwell *v.* Ex. Co., 191.
Bardwell *v.* R. Co., 312.
Barker *v.* Coffin, 241, 242.
Barker *v.* R. Co., 264.
Barnard *v.* Kobbe, 22.
Barney *v.* Prentiss, 143, 154.
Barney *v.* R. Co., 230.
Barney *v.* The D. R. Martin, 222, 224.
Barrett *v.* Cole, 70.
Barrett *v.* R. Co., 103, 160.
Barrett *v.* Rogers, 170.
Barrett *v.* Williamson, 12.
Barron *v.* Eldridge, 112.
Barron *v.* R. Co., 294.
Barron *v.* Rhinelander, 58.
Barrott *v.* Pull. Pal. Car. Co., 324, 325, 328.
Barrow *v.* Paxton, 51.
Barry *v.* Edmunds, 348.
Barry *v.* Oyster Bay &c. Co., 222.
Barter *v.* Wheeler, 103, 137, 162, 295.
Bartholomew *v.* R. Co., 287.
Bartlett *v.* Crozier, 330.
Bartlett *v.* Johnson, 69.
Bartlett *v.* R. Co., 137, 204.
Bartlett *v.* Tel. Co., 317, 319, 320, 342, 349.
Barton *v.* R. Co., 307.
Barwell *v.* North, 116.
Basin *v.* Steamship Co., 166.
Bass *v.* R. Co., 251, 255, 257, 265, 297, 348.
Bassett *v.* R. Co., 188.
Bastard *v.* Bastard, 92.
Bateet *v.* Hartley, 47.
Bates *v.* R. Co., 247, 248.
Bates *v.* Stanton, 23, 29, 209.
Batson *v.* Donovan, 142.
Batterson *v.* Vogel, 80, 81.
Baxendale *v.* R. Co., 92.
Baxter *v.* Leland, 166, 169.
Baxter *v.* Wheeler, 169.
Bay City &c. R. Co. *v.* Austin, 296.
Bayley *v.* R. Co., 298.
Baylies *v.* Fisher, 16.
Bayliss *v.* Lintott, 271.
Bazin *v.* Steamship Co., 205, 338.
Beale *v.* Posey, 74, 81.
Bealli *v.* Southern Bank, 54.
Bean *v.* Bolton, 26.
Bean *v.* Green, 109, 137, 146.
Bean *v.* Sturtevant, 84.
Beard *v.* R. Co., 122, 234.
Beardslee *v.* Richardson, 22, 29, 33.
Bearse *v.* Ropes, 166, 334, 337, 338.
Beasley *v.* Tel. Co., 319, 320, 350.
Beatty *v.* Gilmore, 341.
Beauchamp *v.* R. Co., 268.
Beaupre *v.* Tel. Co., 349.
Beck *v.* Evans, 136, 155.
Becker *v.* Haynes, 81.
Becker *v.* Smith, 8.
Becker *v.* Tel. Co., 320.
Beckford *v.* Crutwell, 125.
Beckman *v.* Shouse, 84, 139.
Beebe *v.* Ayres, 241, 263.
Beekman *v.* R. Co., 218.
Beeman *v.* Lawton, 51, 70.
Beers *v.* R. Co., 341.
Behm *v.* Tel. Co., 317, 349.
Belden *v.* Perkins, 51, 57.
Belfast R. Co. *v.* Keys, 272, 278.
Belfast, The *v.* Boon, 129.
Belger *v.* Dinsmore, 133, 149, 160.
Bell *v.* Drew, 272.
Bell *v.* Monahan, 15.
Bell *v.* Palmer, 27.
Bell *v.* R. Co., 202, 295, 345.
Bell *v.* Reed, 125.
Beller *v.* Schultz, 38.
Bell Tel. Co. *v.* Balt. &c. Tel. Co., 323.
Bell Tel. Co. *v.* Com., 323.

The References are to Sections.

Bellona, The, 137.
Bellows *v.* Denison, 13.
Benbow *v.* R. Co., 201.
Bendetson *v.* French, 78, 81.
Benjamin *v.* Streuple, 68.
Bennett *v.* Byram, 123, 127, 200, 204.
Bennett *v.* Dutton, 137, 140, 217, 218, 222, 223.
Bennett *v.* Filyaw, 106, 337, 338.
Bennett *v.* Mellor, 74, 77.
Bennett *v.* O'Brien, 37, 38, 332.
Bennett *v.* R. Co., 158, 241, 262, 315, 338.
Bennett *v.* Steamb. Co., 217, 218.
Bennett *v.* Truebody, 301.
Benson, Exparte, 92.
Benson *v.* N. J. Trans. Co., 346.
Benson *v.* Titcomb, 311.
Bentley *v.* Bustard, 166.
Benton *v.* R. Co., 297, 341.
Benton *v.* Wilkinson, 23.
Berg *v.* R. Co., 101, 107.
Berg *v.* Steam. Co., 103.
Bergersexen, The, 166.
Bergheim *v.* R. Co., 289.
Berje *v.* R. Co., 162.
Berkshire Woolen Co. *v.* Proctor, 12, 74, 76, 79, 80, 82, 327.
Bermuda, The, 142, 182.
Bernona, The, 315.
Bernstein *v.* Sweeney, 72, 81.
Berringer *v.* R. Co., 291.
Berry *v.* Cooper, 137, 338.
Berry *v.* Gibbons, 55.
Berry *v.* Mareix, 40.
Berry *v.* R. Co., 266, 340.
Bethea *v.* R. Co., 240, 244, 290.
Betts *v.* Farmers' Loan Co., 135, 137.
Bevan *v.* Waters, 27.
Bever *v.* Tomlinson, 161.
Bevis *v.* R. Co., 325, 328, 343.
Bier *v.* Standard Man. Co., 329.
Bigelow *v.* Heaton, 26.
Bigelow *v.* Rutland, 341.
Bigelow *v.* Young, 60.
Bingham *v.* Lamping, 131, 207.
Bingham *v.* Rogers, 139.
Binney *v.* R. Co., 317.
Binney *v.* Tel. Co., 319, 320.
Binns *v.* Pigot, 215.
Bird *v.* Cromwell, 166.
Birge *v.* Gardiner, 341.
Birkett *v.* R. Co., 291, 293.
Birkett *v.* Tel. Co., 320.
Birkett *v.* Willan, 125.
Birney *v.* Tel. Co., 320.
Bishop *v.* Williamson, 330.
Bissel *v.* Campbell, 177.
Bissell *v.* Huntingdon, 15.
Bissell *v.* Price, 160, 170.
Bissell *v.* R. Co., 33, 100, 139, 157, 236, 247, 248.
Black *v.* Bogert, 70.
Black *v.* Canal Co., 296.
Black *v.* R. Co., 154, 158, 345, 347.
Black *v.* Trans. Co., 137, 142.
Black Hawk, The, 166.
Blackmore *v.* R. Co., 225.
Blackwell *v.* Wiswall, 300.
Black Warrior, The, 160, 170.
Blackwood *v.* Brown, 55.
Blade *v.* R. Co., 160.
Blair *v.* R. Co., 225, 247.
Blaisdell *v.* R. Co., 188.
Blake *v.* Feris, 300, 301.
Blake *v.* Kimball, 44.
Blake *v.* Paul, 55.
Blake *v.* R. Co., 347.
Blakemore *v.* R. Co., 24.
Blanchard *v.* Isaacs, 84, 114, 116.
Blanchard *v.* Jones, 272.
Blanchard *v.* Page, 211.
Bland *v.* Adams Ex. Co., 123.
Bland *v.* R. Co., 224, 260, 261.
Bland *v.* Womack, 33.
Blarcom *v.* Broadway, 55.
Blin *v.* Mayo, 48.
Bliss *v.* Pull. Pal. Car Co., 324.
Bliss *v.* Schaub, 15.
Blitz *v.* Union S. S. Co., 102.
Bliven *v.* R. Co., 131, 209.
Block *v.* R. Co., 103.
Blood *v.* Erie Sav. Co., 66.
Bloomington *v.* Rogers, 341.
Blossom *v.* Dodd, 148, 150, 154.
Blossom *v.* Griffin, 112, 156.
Blossman *v.* Hooper, 271.
Blue Jacket, The, 166.
Blum *v.* South. Pull. Car Co., 289, 324, 325, 328.
Blum *v.* The Caddo, 211.
Blumantle *v.* R. Co., 272, 284.
Blumenthal *v.* Brainerd, 137, 145, 146, 201, 202, 295.
Blumenthal *v.* R. Co., 271, 272, 275.
Boardman *v.* Holmes, 52.
Bobolink, The, 201.
Bodenham *v.* Bennett, 125.
Bodkin *v.* Tel. Co., 349.
Bodwell *v.* Bragg, 81.
Bodwell *v.* Florence, 81.
Boehl *v.* R. Co., 142.
Boehm *v.* U. S., 58.
Bogert *v.* Haight, 47.
Bohannan *v.* Hammond, 123.
Bohannan *v.* Springfield, 5.
Bohler *v.* Owens, 80.
Boice *v.* R. Co., 242.
Boies *v.* R. Co., 332, 334.
Bolan *v.* Williamson, 330.
Bolton *v.* Calder, 12.
Bomar *v.* Maxwell, 271, 272.
Bonanno *v.* The Boshenna Bay, 162, 178.
Bonce *v.* R. Co., 84, 341.
Bond *v.* Frost, 170.
Bond *v.* The Cora, 127.
Bonner *v.* De Mendoza, 328.
Bonner *v.* Glenn, 304.
Bonner *v.* Welborn, 72.
Bonsey *v.* Amee, 51, 70.
Boon *v.* The Belfast, 129.
Boorman *v.* Am. Ex. Co., 137, 148, 149, 152.
Boothby *v.* Plaisted, 211.
Bordeaux *v.* R. Co., 261.
Boskowitz *v.* Adams Ex. Co., 133, 137, 139, 152, 155, 193, 336.

The References are to Sections.

Boson *v.* Sanford, 84.
Boston &c. R. Co. *v.* Chipman, 263.
Boston &c. R. Co. *v.* Shanly, 212.
Boston &c. R. Co. *v.* Proctor, 242.
Bostwick *v.* Champion, 103.
Bostwick *v.* R. Co., 156, 183, 205.
Boswell *v.* Laird, 301.
Boswell *v.* R. Co., 139, 248.
Bosworth *v.* Swansey, 341.
Boughton *v.*U. S., 53.
Bourg *v.* Lopez, 8.
Bourgo *v.* White, 329.
Bowen *v.* R. Co., 231, 340.
Bowen *v.* Tel. Co., 317, 349.
Bower *v.* Peate, 301.
Bower *v.* R. Co., 296.
Bowers *v.* Evans, 8.
Bowman *v.* Hilton, 84.
Bowman *v.* Teall, 16, 83, 84.
Bowman *v.* Wood, 52, 58.
Boyce *v.* Anderson, 231.
Boyce *v.* Cal. Stage Co., 340.
Boyce *v.* The Empress, 12.
Boyce *v.* Welch, 166.
Boyd *v.* Meighan, 344.
Boylan *v.* R. Co., 147.
Boynton *v.* Payrow, 51, 52, 62.
Brackett *v.* Lubke, 300, 301.
Brackett *v.* McNair, 345.
Bradburn *v.* R. Co., 347.
Bradford *v.* Marbury, 211.
Bradley *v.* Baylis, 327.
Bradley *v.*Cunningham, 20.
Bradley *v.* Parks, 57.
Bradley *v.* Spofford, 15.
Bradshaw *v.* R. Co., 244.
Bradstreet *v.* Heran, 170.
Bradwell *v.* R. Co., 341.
Brand *v.* Dale, 112.
Brand *v.* R. Co., 298.
Brandon *v.* Gulf City Mfg. Co., 14.
Brandon *v.* Huntsville Bank, 15.
Brandon *v.* Scott, 28.
Brantford City, The, 137, 166.
Brashaer *v.* R. Co., 308.
Brass *v.* R. Co., 96.
Braslin *v.* R. Co., 296.
Brass *v.* Worth, 62.
Brassell *v.* R. Co., 234.
Brauer *v.* The Almoner, 172, 338.
Breen *v.* R. Co. 241.
Breese *v.* Tel. Co., 317, 319, 349.
Brehl *v.* R. Co., 137.
Brehm *v.* R. Co., 233, 340.
Brehme *v.* Adams Ex. Co., 137, 142. 149.
Bremner *v.* Williams, 232.
Brennan *v.* R. Co., 269.
Bretherton *v.* Wood, 217, 219.
Bretz *v.* Diehl, 8.
Brewer *v.* R. Co., 225.
Brewster *v.* Hartley, 51, 52.
Brewster *v.*Warner, 15.
Brick *v.* Freehold Co., 53, 55.
Bricker *v.* R. Co., 225.
Bridges *v.* Hawkesworth, 15.
Bridges *v.* Lanham, 344.
Bridges *v.* R. Co., 254.
Brien *v.* Bennett, 227.
Bries *v.* Cook, 42.
Briggs *v.* Dearborn, 5.
Briggs *v.* R. Co., 26, 102, 215, 241, 242, 308, 345.
Briggs *v.* Taylor, 11.
Briggs *v.* Vanderbilt, 103.
Brignoli *v.* R. Co., 340.
Brind *v.* Dale, 83.
Bringloe *v.* Morrice, 21.
Brintnall *v.* R. Co., 104.
Bristol &c. R. Co. *v.* Collins, 108.
Bristol, The, 162.
Britannia, The, 166.
British Columbia Bk. *v.* Marshall, 51.
British &c. Ins. Co. *v.* R. Co., 118.
Britton *v.* Harvey, 70.
Britton *v.* R. Co., 302.
Broadwell *v.* Butler, 166, 176.
Broadwood *v.* Granara, 73.
Brock *v.* Gale, 272.
Brockway *v.* Maloney, 211.
Brokaw *v.* R. Co., 297.
Brounenburg *v.* Charman, 33.
Brooke *v.* Pickwick, 133, 136, 143, 272.
Brooke *v.* R. Co., 115, 241, 291.
Brooks *v.* Am. Ex. Co., 185
Brousseau *v.* The Hudson, 122.
Brouty *v.* 500 Staves, 160.
Brown, exparte, 295.
Brown *v.* Adams, 158.
Brown *v.* Bement, 51.
Brown *v.* Billington, 8.
Brown *v.* Brown, 295.
Brown *v.* Clegg, 85.
Brown *v.* Cook, 22, 29.
Brown *v.* Cunard S. S. Co., 171.
Brown *v.* Denison, 49.
Brown *v.* Ex. Co., 137, 232, 337, 338.
Brown *v.* Harris, 250.
Brown *v.* Hitchcock, 12, 14, 417.
Brown *v.* Hodgson, 211.
Brown *v.* Johnson, 332.
Brown *v.* Mott, 103.
Brown *v.* Pruveance, 297.
Brown *v.* R. Co., 86, 137, 142, 148, 158, 223, 225, 230, 231, 236, 240, 255, 258, 265, 266, 276, 298, 340, 347.
Brown *v.* Runals, 69.
Brown *v.* Steamship Co., 142.
Brown *v.* Tel. Co., 317.
Brown *v.* Warren, 51.
Brown *v.* Waterman, 42.
Brown *v.* Werner, 301.
Browne *v.* R. Co., 266.
Brownell *v.* Hawkins, 51, 68.
Browning *v.* R. Co., 158.
Browning *v.* The St. Patrick, 166.
Bruce *v.* Garden, 52.
Bruley *v.* Rose, 70.
Brush *v.* R. Co., 137.
Bruty *v.* R. Co., 272.
Bryce *v.* Brook, 27.
Bryan *v.* Baldwin, 62, 63, 64.
Bryan *v.* R. Co., 232, 248.
Bryant *v.* Com. Ins. Co., 214.
Bryant *v.* Crosby, 8.
Bryant *v.* R. Co., 135, 162.
Bryant *v.* Rich, 297, 298.
Bryant *v.* Tel. Co., 317, 320.

The References are to Sections.

Bryant *v.* Wardwell, 17.
Bryson *v.* Rayner, 61, 62, 63.
Buchanan *v.* International Bk., 53.
Buchanan *v.* Smith, 21.
Bucher *v.* R. Co., 312.
Buck *v.* Ingersoll, 59.
Buckingham *v.* Fisher, 47, 48.
Buckland *v.* Adams Ex. Co., 84, 123, 137, 146.
Buckley *v.* Andrews, 44.
Buckley *v.* R. Co., 202.
Buckman *v.* Levi, 113.
Buddenburg *v.* Benner, 80.
Buel *v.* R. Co., 308.
Buenoman *v.* R. Co., 234.
Buesching *v.* St. Louis Gas Co., 341.
Buffalo &c. R. Co. *v.* O'Hara, 139, 248.
Buffett *v.* R. Co., 227, 293.
Buffum *v.* Merry, 8.
Bulkeley *v.* Welch, 69.
Bulkley *v.* Naumkeag Cotton Co., 122, 166.
Bull *v.* Douglass, 344.
Bullard *v.* Billings, 57.
Burdict *v.* Murray, 15, 26.
Burgess *v.* Clements, 73, 79, 80.
Burgin *v.* R. Co., 308.
Burgundia, The, 314.
Burke *v.* R. Co., 240.
Burke *v.* Savage, 15.
Burke *v.* Trevet, 44.
Burley *v.* Gladstone, 215.
Burlington &c. R. Co. *v.* Fuel Co., 92.
Burlington &c. R. Co. *v.* Rose, 266.
Burmeister *v.* R. Co., 301.
Burnell *v.* R. Co., 286, 287, 291.
Burnett *v.* Lynch, 330.
Burnham *v.* R. Co., 115, 240, 244, 268.
Burns *v.* R. Co. 230, 231, 236, 306.
Burroughs *v.* R. Co., 101, 107, 109, 115, 141.
Burrows *v.* Bangs, 58.
Burrows *v.* R. Co., 300, 308.
Burrows *v.* Trieber, 76, 77, 80.
Burton *v.* Baird, 211, 301.
Burton *v.* New Jersey Ferry Co., 251.
Burton *v.* Wilkinson, 131.
Burwell *v.* R. Co., 160.
Burwell *v.* Stern, 332.
Bussey *v.* Miss. Valley &c. Co., 85.
Bussey *v.* R. Co., 100, 101, 102.
Bush *v.* Johnson, 341.
Bush *v.* Miller, 22, 49.
Butler *v.* Basing, 84.
Butler *v.* Hearne, 143, 154.
Butler *v.* R. Co., 278.
Butler *v.* Walker, 21.
Butler *v.* Woolcott, 215.
Butner *v.* Tel. Co., 351.
Butt *v.* R. Co., 332.
Butterfield *v.* Forrester, 341.
Butterfield *v.* Lathrop, 8.
Butterworth *v.* Kennedy, 59.
Button *v.* R. Co., 340, 341.
Buxton *v.* R. Co., 291, 293.
Buzzell *v.* Laconia Man. Co., 341.
Byrne *v.* R. Co., 296.
Byrne *v.* Wilson, 313.

C.

Cabaniss *v.* Ponder, 8.
Cadwallader *v.* R. Co., 272.
Cady *v.* McDowell, 72.
Cady *v.* Spencer, 77.
Cahill *v.* R. Co., 272, 275, 278.
Cahn *v.* R. Co., 201.
Cailiff *v.* Danvers, 47, 125.
Caldwell *v.* Hall, 8.
Caldwell *v.* Murphy, 347.
Caldwell *v.* N. J. Steam. Co., 232, 236, 340, 348.
Caledonia, The, 160.
Caleff *v.* Danvers, 83.
Calhoun *v.* Thompson, 17.
California, The, 170, 182.
Callahan *v.* Bean, 341.
Callahan *v.* R. Co., 301.
Calye's Case, 76, 80.
Camden &c. Ferry Co. *v.* Monoghan, 307.
Camden &c. R. Co. *v.* Baldauf, 133, 139, 271, 278.
Camden &c. Trans. Co. *v.* Beknap, 84, 139, 282.
Camden &c. R. Co. *v.* Burke, 162, 231, 270, 271.
Camden &c. R. Co. *v.* Forsyth, 101, 107, 109.
Camden &c. R. Co. *v.* Hoosey, 251, 306.
Camden &c. R. Co. *v.* Pasch, 247, 248.
Cameron *v.* Rich, 337, 338.
Camp *v.* Barney, 295.
Camp *v.* Church Wardens, 301.
Camp *v.* Hartford Steamb. Co., 137.
Camp *v.* Tel. Co., 317, 319.
Campbell *v.* Morse, 125.
Campbell *v.* Parker, 52.
Campbell *v.* Perkins, 293.
Campbell *v.* Pull. Pal. Car Co., 324, 328.
Campbell *v.* Somerville, 301.
Campion *v.* R. Co., 94.
Canadian Pacific R. Co. *v.* Johnson, 266.
Canadian, The, 250, 346, 347.
Candee *v.* R. Co., 100, 103, 288, 291, 292.
Candee *v.* Tel. Co., 319, 349.
Candiff *v.* R. Co., 266.
Canfield *v.* Minn. &c. Assn., 62, 63.
Canfield *v.* R. Co., 162, 338.
Canning *v.* Williamstown, 347.
Cannon *v.* Tel. Co., 349.
Cannon &c. Manfg. Co. *v.* Bank, 33.
Canrice *v.* Spanton, 19.
Cantling *v.* R. Co., 137, 143, 284.
Cantu *v.* Bennett, 162.
Capehart *v.* Furnham Co., 211.
Capehart *v.* R. Co., 158.
Carao *v.* Guimaraes, 170.
Cardin *v.* Jones, 58.
Cardot *v.* Barney, 295.

The References are to Sections.

Carey *v.* Atkins, 162, 338.
Carey *v.* R. Co., 100.
Carle *v.* Bearce, 22.
Carlin *v.* R. Co., 341.
Carlotta, The, 166.
Carmen *v.* Steubenville, 301.
Carpenter *v.* Branch, 37, 38, 41.
Carpenter *v.* Mining Co., 295.
Carpenter *v.* R. Co., 234, 241, 302, 325, 328.
Carpenter *v.* Taylor, 72, 327.
Carpue *v.* R. Co., 340.
Carr *v.* R. Co., 86, 136.
Carr *v.* The Michigan, 176.
Carrico *v.* R. Co., 304.
Carrier *v.* Dorrance, 42.
Carrington *v.* Ficklin, 33.
Carroll *v.* Mix, 23.
Carroll *v.* Mullanphy Sav. Bk., 63.
Carroll *v.* R. Co., 231, 232, 236, 247, 312.
Carson *v.* Harris, 137, 160, 170.
Carson *v.* Prater, 15.
Carter *v.* Berlin Mills, 301.
Carter *v.* Hobbs, 74.
Carter *v.* Hough, 106.
Carter *v.* Peck, 103, 291, 292.
Carter *v.* R. Co., 257, 297, 341.
Cartwright *v.* Wilmerding, 51.
Cartwright *v.* R. Co., 254.
Cary *v.* R. Co., 292.
Casco, The, 166.
Case *v.* Baldwin, 103.
Case *v.* Fogg, 26.
Casey *v.* Cavaroc, 51.
Cashill *v.* Wright, 76, 80.
Cass *v.* Higenbotam, 61.
Cass *v.* R. Co., 12, 40, 332.
Cassidy *v.* Angell, 341.
Cassilay *v.* Young, 176, 205.
Caswell *v.* R. Co., 234.
Caton *v.* Rumney, 85.
Cavanaugh *v.* Dinsmore, 297.
Cayle's Case, 327.
Ceas *v.* Bramley, 51.
Cecil *v.* Preuch, 45.
Centhore *v.* Ryder, 77.
Central Line *v.* Lowe, 121, 198.
Cent. Pass. Co. *v.* Swain, 307.
Cent. R. Co. *v.* Armstrong, 230.
Cent. R. Co. *v.* Avant, 101.
Cent. R. Co. *v.* Brelsford, 86.
Cent. R. Co. *v.* Bryant, 137, 140, 187.
Cent. R. Co. *v.* Combs, 106, 291.
Cent. R. Co. *v.* Davidson, 304.
Cent. R. Co. *v.* Dwight Man. Co., 140.
Cent. R. Co. *v.* Frankenberg, 101.
Cent. R. Co. *v.* Grant, 301.
Cent. R. Co. *v.* Green, 265.
Cent. R. Co. *v.* Lampley, 85, 308, 330.
Cent. R. Co. *v.* Mason, 341.
Cent. R. Co. *v.* Nelson, 266.
Cent. R. Co. *v.* Perry, 227.
Cent. R. Co. *v.* Rogers, 111.
Cent. R. Co. *v.* Smith, 347.
Cent. &c. R. Co. *v.* Soper, 158.
Cent. R. Co. *v.* Van Horn, 253, 254.
Cent. Trust Co. *v.* R. Co., 107, 314.
Cent. Union Tel. Co. *v.* Bradbury, 323.
Cent. Union Tel. Co. *v.* Falley, 323.
Chaffee *v.* R. Co., 234.
Chalk *v.* R. Co., 201.
Chamberlain *v.* Chandler, 298.
Chamberlain *v.* Cobb, 37, 41, 42.
Chamberlain *v.* Masterson, 76, 80.
Chamberlain *v.* Smith, 8.
Chamberlain *v.* West. Trans. Co., 271, 272.
Chambers *v.* Crawford, 43.
Chambersburg Ins. Co. *v.* Smith, 50.
Chamblis *v.* R. Co., 90.
Champion *v.* Bostwick, 103, 293.
Chandler *v.* Belden, 26, 215.
Chaney *v.* R. Co., 241.
Chapman *v.* R. Co., 315, 334.
Chapman *v.* Tel. Co., 350, 351.
Chapman *v.* Turner, 69.
Charles *v.* Coker, 59.
Charles *v.* Lasher, 84.
Chartered Mer. Bk. *v.* Netherland Steam. Nav. Co., 166.
Chasca, The, 166.
Chase *v.* Maberry, 33.
Chase *v.* R. Co., 261.
Chase *v.* Washburn, 8, 47.
Chase, The, 131.
Chattahooche Bk *v.* Schley, 29.
Check *v.* R. Co., 285.
Cheesborough *v.* Taylor, 76.
Cheney *v.* R. Co., 241, 268.
Chenowith *v.* Dickinson, 12, 47.
Chesapeake &c. R. Co. *v.* Wells, 265.
Chesapeake &c. Tel. Co. *v.* Balt. &c. Tel. Co., 323.
Chesley *v.* St. Clair, 15.
Chevalier *v.* Straham, 83, 84, 122, 123, 125.
Child *v.* Hugg, 62, 64.
Chiles *v.* Garvison, 8.
Chilton *v.* R. Co., 259.
Chism *v.* Woods, 17.
Chollette *v.* R. Co., 291.
Chouteau *v.* Allen, 62.
Chouteau *v.* Leach, 83, 128, 152, 166.
Christian *v.* Miller, 344.
Christian *v.* R. Co., 159.
Christenson *v.* American Ex. Co., 84, 109, 137, 166.
Christie *v.* Griggs, 231, 232, 340.
Chronicle, The, 205.
Chrystal Palace, The, 289.
Chubb *v.* Renaud, 135.
Church *v.* R. Co., 241.
Chicago *v.* Major, 341.
Chicago *v.* Robbins, 301.
Chicago Artesian Well Co. *v.* Corey, 63.
Chicago &c. R. Co. *v.* Abels, 137, 142, 158, 335, 337, 338.
Chicago &c. R. Co. *v.* Ackley, 88.
Chic. &c. R. Co. *v.* Addizoat, 287.
Chicago &c. R. Co. *v.* Bannerman, 244.
Chicago &c. R. Co. *v.* Bills, 268.

The References are to Sections.

Chicago &c. R. Co. *v.* Boger, 257, 260. 262.
Chic. &c. R. Co. *v.* Boyce, 272, 286, 287.
Chicago &c. R. Co. *v.* Bursley, 201.
Chicago &c. R. Co. *v.* Carroll, 221.
Chicago &c. R. Co. *v.* Chisholm, 268.
Chicago &c. R. Co. *v.* Church, 101.
Chicago &c. R. Co. *v.* Clayton, 285. 288.
Chicago &c. R. Co. *v.* Collins, 272.
Chicago &c. R. Co. *v.* Conklin, 278.
Chicago &c. R. Co. *v.* Dewey, 309.
Chicago &c. R. Co. *v.* Cross, 309.
Chicago &c. R. Co. *v.* Dickson, 297.
Chicago &c. R. Co. *v.* Erickson, 89.
Chicago &c. R. Co. *v.* Fahey, 270, 271, 288, 291.
Chicago &c. R. Co. *v.* Fairclough, 287.
Chicago &c. R. Co. *v.* Felton, 308.
Chicago &c. R. Co. *v.* Fillmore, 234.
Chicago &c. R. Co. *v.* Flagg, 257, 261, 266, 347.
Chicago &c. R. Co. *v.* Flexman, 298.
Chicago &c. R. Co. *v.* George, 304.
Chicago &c. R. Co. *v.* Gregory, 341.
Chicago &c. R. Co. *v.* Griffin, 244, 267, 347.
Chicago &c. R. Co. *v.* Hale, 139.
Chicago &c. R. Co. *v.* Harmon, 86, 142.
Chicago &c. R. Co. *v.* Hazard, 341.
Chicago &c. R. Co. *v.* Herring, 348.
Chicago &c. R. Co. *v.* Honey, 304.
Chicago &c. R. Co. *v.* Katzenbach, 158, 212.
Chicago &c. R. Co. *v.* Landauer, 231, 304.
Chicago &c. R. Co. *v.* Manning, 125.
Chicago &c. R. Co. *v.* Marcus, 275.
Chicago &c. R. Co. *v.* McCool, 202.
Chicago &c. R. Co. *v.* McKean, 347.
Chicago &c. R. Co. *v.* Michie, 225.
Chicago &c. R. Co. *v.* Minnesota, 88.
Chicago &c. R. Co. *v.* Montfort, 101, 106, 137.
Chicago &c. R. Co. *v.* Moss, 137, 162, 338.
Chicago &c. R. Co. *v.* Owen, 86.
Chicago &c. R. Co. *v.* Parks, 217, 257, 261, 297.
Chicago &c. R. Co. *v.* Peacock, 257.
Chicago &c. R. Co. *v.* Penn, 290.
Chicago &c. R. Co. *v.* Pillsbury, 302.
Chicago &c. R. Co. *v.* Pondrom, 307, 347.
Chicago &c. R. Co. *v.* Pratt, 202.
Chicago &c. R. Co. *v.* People, 88, 89, 92, 106, 255.
Chicago &c. R. Co. *v.* R. Co., 89.
Chicago &c. R. Co. *v.* Randolph, 266, 268, 312.
Chicago &c. R. Co. *v.* Roberts, 257.
Chicago &c. R. Co. *v.* Sawyer, 122, 201.
Chicago &c. R. Co. *v.* Scates, 234, 308.
Chicago &c. R. Co. *v.* Scott, 202.
Chicago &c. R. Co. *v.* Simms, 158.
Chicago &c. R. Co. *v.* Sykes, 312.
Chicago &c. R. Co. *v.* Thompson, 84, 133.
Chicago &c. R. Co. *v.* Thrapp, 205.
Chicago &c. R. Co. *v.* Trotter, 340.
Chicago &c. R. Co. *v.* Whipple, 296.
Chicago &c. R. Co. *v.* Williams, 223, 255, 265, 348.
Chicago &c. R. Co. *v.* Wilson, 234.
Cincinnati *v.* Stone, 301.
Cincinnati &c. Mail Co. *v.* Boal, 95.
Cincinnati &c. R. Co. *v.* Carper, 225. 229.
Cincinnati &c. R. Co. *v.* Cole, 297.
Cincinnati &c. R. Co. *v.* Cooper, 267, 269.
Cincinnati &c. R. Co. *v.* Eaton, 346, 347.
Cincinnati &c. R. Co. *v.* Farrell, 300.
Cincinnati &c. R. Co. *v.* Marcus, 133, 270, 271.
Cincinnati &c. R. Co. *v.* McCool, 40, 47.
Cincinnati &c. R. Co. *v.* McMullen, 341.
Cincinnati &c. R. Co. *v.* Pontius, 101, 137, 148, 247.
Cincinnati &c. R. Co. *v.* Skillman, 261.
Cincinnati &c. R. Co. *v.* Spratt, 103.
Cincinnati &c. R. Co. *v.* Walroth, 232.
Citizens' Bank *v.* Dows, 70.
Citizens' Bank *v.* Nantucket Steamboat Co., 83, 84, 94, 95, 98.
Citizens' Ins. Co. *v.* Kountz Line, 103.
Citizens' Nat. Bank *v.* Hooper, 70.
City Bank of Racine *v.* Babcock, 62, 64.
City Fire Ins. Co. *v.* Olmstead, 51.
City of Alexander, The, 166.
City of Anderson *v.* Harvey, 341.
City of Fort Wayne *v.* De Witt, 341.
City of Lincoln *v.* Walker, 341.
City of Norwich, The, 137, 162, 166.
City of St. Louis *v.* Bell Telephone Co., 323.
City of Tiffin *v.* McCormack, 301.
City of Washington, The, 12.
Claflin *v.* Meyer, 40, 47.
Claflin *v.* R. Co. *v.* 206.
Clapp *v.* Nelson, 22.
Clapp *v.* R. Co., 347.
Clare *v.* Tel. Co., 351.
Clark *v.* Barnwell, 84, 123, 166, 182, 337, 338.
Clark *v.* Bouvain, 64.
Clark *v.* Burns, 289.
Clark *v.* Carlton, 15.
Clark *v.* Earnshaw, 43.
Clark *v.* Faxton, 84, 139.
Clark *v.* Fry, 301.
Clark *v.* Iselin, 70.
Clark *v.* Maloney, 15.
Clark *v.* R. Co., 137, 215, 256, 262, 301, 306, 338.
Clark *v.* Sparbank, 344.
Clarke *v.* Gray, 136, 142.
Clarke *v.* Needles, 112.
Clarke *v.* Poozer, 15.

The References are to Sections.

Clarke *v.* R. Co., 86, 129, 130.
Clarkson *v.* Erie &c. Dispatch Co., 103.
Clary *v.* Willey, 46, 72.
Classen *v.* Leopold, 80.
Clay *v.* Tel. Co., 349.
Clay *v.* Willan, 136, 142.
Claypool *v.* McAllister, 84.
Clayton *v.* Hunt, 143.
Cleghorn *v.* Minnesota Trust Co., 66.
Cleghorn *v.* R. Co., 348.
Clement *v.* Tel. Co., 320.
Clement, The, 12.
Cleveland *v.* N. J. Steam. Co., 225, 227.
Cleveland &c. R. Co. *v.* Bartram, 241, 266.
Cleveland &c. R. Co. *v.* Crawford, 341.
Cleveland &c. R. Co. *v.* Curran, 137, 247.
Cleveland &c. R. Co. *v.* Manson, 312.
Cleveland &c. R. Co. *v.* Perkins, 156.
Cleveland &c. R. Co. *v.* Terry, 304.
Cloud *v.* R. Co., 244.
Clourd *v.* R. Co., 115.
Clussman *v.* R. Co., 228, 234, 252.
Clute *v.* Wiggins, 76, 77.
Clyde *v.* Hubbard, 103.
Clymer *v.* R. Co., 293.
Coal Co. *v.* Helman, 328.
Cobb *v.* Abbot, 103.
Cobb *v.* R. Co., 101.
Cobb *v.* Wallace, 22.
Cobban *v.* Downe, 116.
Cobden *v.* Boulton, 154.
Cochran *v.* Dinsmore, 339.
Cochran *v.* N. Shore &c. Ferry Co., 233, 234.
Cockle *v.* R. Co., 254.
Coddington *v.* Bay, 54.
Cody *v.* R. Co., 243.
Coffin *v.* Chicago Co,, 62.
Coffin *v.* R. Co., 156.
Coger *v.* Packet Co., 265.
Coggs *v.* Bernard, 1, 5, 6, 33, 38, 50, 83, 119, 120, 129, 232.
Cohen *v.* Frost, 112.
Cohen *v.* Hume, 84.
Cohen *v.* R. Co., 162, 297, 298.
Cohen *v.* South. Ex. Co., 106.
Coit *v.* Humbert, 57.
Cole *v.* Daniels, 62.
Cole *v.* Goodwin, 84, 139, 142, 270, 271.
Cole *v.* Tel. Co., 320.
Colegrove *v.* R. Co., 312, 315.
Coleman *v.* Frazier, 330.
Coleman *v.* Livingston, 332.
Coleman *v.* R. Co., 241, 257, 297, 298, 309.
Coleman *v.* Shelton, 68.
Collard *v.* R. Co., 345.
Collenberg, The, 130, 213.
Collender *v.* Dinsmore, 103, 149, 160, 185.
Collett *v.* R. Co., 225.
Collier *v.* Valentine, 166, 337.
Collins' Appeal, 51.
Collins *v.* Bennett, 16, 332.
Collins *v.* Burns, 22.
Collins *v.* Buck, 70.
Collins *v.* Dawley, 70.
Collins *v.* Woodruff, 25.
Collins *v.* R. Co., 106, 271, 272, 278, 279, 347.
Collis *v.* Selden, 230.
Collman *v.* Collins, 215.
Colon, The, 162.
Colonel Ledyard, The, 134.
Colquitt *v.* Stultz, 65.
Colt *v.* McMechen, 121.
Colton *v.* R. Co., 148, 162, 169, 338.
Colton *v.* Wise, 8.
Columbo, The, 182.
Columbus &c. R. Co. *v.* Arnold, 226.
Columbus &c. R. Co. *v.* Farrell, 254.
Columbus &c. R. Co. *v.* Powell, 225, 269.
Colwell *v.* R. Co., 307.
Colyar *v.* Taylor, 20, 33, 83.
Commander-in-Chief, The, 84.
Com. Bank of New Orleans *v.* Martin, 8, 58.
Com. Union Tel. Co. *v.* New England Tel. Co., 323.
Com. *v.* Farnum, 211.
Com. *v.* Mitchell, 73.
Com. *v.* Pierce, 24.
Com. *v.* Power, 224, 264.
Com. *v.* R. Co., 225, 245.
Com. *v.* Smith, 295.
Com. *v.* Wetherbee, 72.
Comp *v.* Bank, 76.
Compta, The 166, 337.
Compton *v.* Shaw, 20.
Comstock *v.* Smith, 53.
Conard *v.* Atlantic Ins. Co., 51, 55.
Concord &c. R. Co. *v.* Forsaith, 92.
Condict *v.* R. Co., 100, 107, 139, 162.
Condon *v.* R. Co., 104.
Congar *v.* R. Co., 134.
Conger *v.* R. Co., 86, 130, 299, 300.
Conkey *v.* R. Co., 104, 105.
Connell *v.* Tel. Co., 351.
Connell *v.* Voorhees, 330.
Connor *v.* R. Co., 308.
Connor *v.* Winton, 30, 33, 35.
Connolly *v.* R. Co., 267, 269.
Connolly *v.* Warren, 272.
Conrad *v.* Tel. Co., 320.
Converse *v.* Norwich &c. Trans. Co., 103, 104, 116.
Converse *v.* R. Co., 103, 107.
Conway Bank *v.* American Express Co., 14.
Conwell *v.* Smith, 33, 42.
Conyngham's Appeal, 52, 57, 62, 69.
Cook *v.* Gourdine, 84, 125.
Cook *v.* Gowan, 213.
Cook *v.* Holt, 23.
Cook *v.* Kane, 82.
Cook *v.* R. Co., 90.
Coombs *v.* R. Co., 211.
Cooper *v.* Berry, 133, 137.
Cooper *v.* Ray, 70.

The References are to Sections.

Cooper *v.* Young, 345.
Copeland *v.* Draper, 24.
Copley *v.* R. Co., 341.
Coppin *v.* Brathwaite, 250.
Corbett *v.* Underwood, 51.
Corbin *v.* Am. Mills, 300.
Corcoran *v.* R. Co., 341.
Corfield *v.* Coryell, 15.
Cornman *v.* R. Co., 234.
Cortelyou *v.* Lansing, 51, 60, 62, 71.
Costa Rica, The, 166.
Costello *v.* R. Co., 232.
Costigan *v.* Michael Trans. Co., 166.
Costikyan *v.* R. Co., 251.
Cothran *v.* Ellis, 344.
Cothran *v.* Moore, 16.
Coup *v.* Wabash &c. R. Co., 84.
County Commrs. *v.* Burgess, 341.
Covington *v.* Newberger, 82.
Covington *v.* Willan, 136.
Coward *v.* R. Co., 137, 142, 272.
Cowden *v.* Pac. Coast S. S. Co., 92.
Coweta Falls Man. Co. *v.* Rogers, 344.
Cowles *v.* Pointer, 47.
Cowley *v.* Davidson, 166.
Cox *v.* Easley, 15.
Cox *v.* Foscue, 127.
Cox *v.* McGuire, 54.
Cox *v.* O'Riley, 48.
Cox *v.* Peterson, 122, 123, 160, 166.
Cox *v.* Reynolds, 5.
Coxe *v.* Heisley, 133.
Coxon *v.* R. Co., 106.
Crafter *v.* R. Co., 234.
Crafts *v.* Boston, 341.
Cragin *v.* R. Co., 86, 139, 162, 339, 347.
Craig *v.* R. Co., 241.
Craig *v.* Childress, 83, 123, 128, 137.
Craker *v.* R. Co., 347, 348.
Cramp *v.* Mitchell, 21.
Crane *v.* R. Co., 266.
Cranie *v.* Wood, 40.
Crawford *v.* R. Co., 107, 262.
Crawford *v.* Williams, 213.
Crawson *v.* Tel. Co., 351.
Craycroft *v.* R. Co., 107, 137.
Creed *v.* Hartman, 301.
Creed *v.* R. Co., 225, 266, 312.
Crenshawe *v.* Pearce, 115.
Cresson *v.* R. Co., 262.
Crew *v.* R. Co., 341.
Crimp *v.* Mitchell, 17.
Crissey *v.* R. Co., 253, 308.
Croaker *v.* R. Co., 298, 299.
Crocker *v.* Crocker, 57.
Crocker *v.* Gullifer, 17, 21.
Crocker *v.* Monrose, 70, 332.
Crocker *v.* R. Co., 261.
Croft *v.* Alison, 328.
Croft *v.* R. Co., 291, 292.
Crofts *v.* Waterhouse, 232.
Crogan *v.* R. Co., 231, 232.
Crommelin *v.* R. Co., 215.
Cromwell *v.* Stevens, 72, 327.
Cronkite *v.* Wells, 95, 114, 115.
Crosby *v.* Fitch, 84, 121, 166, 205.
Crosby *v.* Grinnell, 166.
Cross *v.* Brown, 5, 42, 44, 332.
Cross *v.* Wilkins, 72.
Crossan *v.* R. Co., 110.
Crouch *v.* R. Co., 95, 96, 345.
Crozier *v.* R. Co., 324.
Crumbacker *v.* Tucker, 26.
Crump *v.* Mitchell, 29.
Crumpley *v.* R. Co., 341.
Cuff *v.* R. Co., 301.
Cuir *v.* Benson, 265.
Cullen *v.* Lord, 16, 21.
Cullum *v.* Emanuel, 53.
Cumberland Valley R. Co.'s Appeal, 91.
Cumberland Valley R. Co. *v.* Meyers, 225.
Cumins *v.* Wood, 332.
Cummings *v.* Harris, 26, 27.
Cummins *v.* R. Co., 101.
Cumnock *v.* Saw. Inst., 65.
Cunningham *v.* R. Co., 301.
Curran *v.* Warren Chem. Wks., 340.
Currell *v.* Johnson, 170.
Curtis *v.* Murphy, 74.
Curtis *v.* R. Co., 232, 236, 253, 262, 286, 340, 347, 350.
Cusack *v.* Robinson, 211.
Cushman *v.* Hayes, 51, 62.
Cutter *v.* Bonney, 76.
Cutter *v.* Hamlen, 24.
Cutting *v.* Marlor, 58.
Cutts *v.* Brainerd, 103, 107.
Cutts *v.* Tel. Co., 349.
Czech *v.* Gen. Steam Nav. Co., 162.

D.

Daggett *v.* Shaw, 123, 166.
Dahlberg *v.* R. Co., 307.
Dale *v.* R. Co., 347.
Dale *v.* Brinckerhoff, 25, 29.
Daly *v.* R. Co., 314.
Dallas &c. R. Co. *v.* Spicker, 341.
Damont *v.* R. Co., 308.
Dana *v.* R. Co., 102, 142.
Danforth *v.* Grant, 330.
Daniel *v.* Tel. Co., 349.
Daniels *v.* R. Co., 301.
Danner *v.* R. Co., 341.
Dansey *v.* Richardson, 72.
Danville Bank *v.* Waddill, 33.
Danville &c. R. Co. *v.* Stewart, 315 347.
D'Arc *v.* R. Co., 162.
Darling *v.* R. Co., 107.
Darst *v.* Bates, 59.
Dart *v.* Lowe, 31, 33.
Daugherty *v.* R. Co., 340, 349.
David and Caroline, The, 137, 162.
Davidson *v.* Graham, 137, 140, 161, 329, 338.
Davis *v.* Garrett, 125, 127.
Davis *v.* Gay, 33.
Davis *v.* Gray, 295.
Davis *v.* R. Co., 62, 120, 123, 125, 147, 227, 230, 251, 272, 285, 288, 338, 345.
Davis *v.* Tel. Co., 316, 349.
Dawes *v.* Peck, 211.
Daws *v.* Duncan, 295.
Dawson *v.* Champney, 76.
Dawson *v.* R. Co., 137, 158.

The References are to Sections.

Day *v.* Bather, 76.
Day *v.* Owen, 218, 219, 255, 265.
Day *v.* Perkins, 344.
Day *v.* Ridley, 128.
Day *v.* Swift, 51, 70.
Day *v.* Woodworth, 348.
Dean *v.* Ritter, 344.
Dean *v.* Vaccaro, 201, 345.
DeCuir *v.* Benson, 88.
Dedekam *v.* Vose, 162.
Deford *v.* Seinour, 212.
DeHaven *v.* Kensington Bank,30, 33.
De Lavalette *v.* Wendt, 344.
Delaware &c. R. Co. *v.* Central Stock Yards Co., 44.
Delaware &c. R. Co. *v.* Napheys, 340.
Delaware, The, 84.
Delhi, The, 137, 162.
Delie *v.* R. Co., 347.
De Lisle *v.* Priestman, 62.
De Lucas *v.* R. Co., 262.
Deming *v.* R. Co., 102, 115, 205, 345.
De Mott *v.* Laraway, 84, 201.
Denison *v.* R. Co., 126.
Dennis *v.* Huyck, 46.
Dennison *v.* The Wataga, 250.
Denny *v.* R. Co., 126.
Denton *v.* R. Co., 237.
Denver &c. R. Co. *v.* Hill, 110.
Denver &c. R. Co. *v.* Ryan, 341.
Depuy *v.* Clark, 58.
Derosia *v.* R. Co., 201, 202.
De Rothschild *v.* Royal Mail Packet, 165, 180.
Derrick *v.* Baker, 29.
De Rutte *v.* Tel. Co., 316, 317, 319, 321, 342, 349.
Derwort *v.* Loomer, 137.
Desha *v.* Pope, 27, 51.
Deslottes *v.* Tel. Co., 322.
De Soucy *v.* R. Co., 307.
Dessauer *v.* Baker, 76.
De Tollenere *v.* Fuller, 16, 21, 38.
Detroit *v.* Corey, 301.
Detroit &c. R. Co. *v.* Adams, 156.
Detroit &c. R. Co. *v.* Bank, 148.
Detroit &c. R. Co. *v.* Curtis, 308, 312.
Detroit &c. R. Co. *v.* McKenzie, 102, 107.
Detroit &c. R. Co. *v.* VanSteinburg, 341.
Devereaux *v.* Buckley, 345.
Devlin *v.* Smith, 301.
DeVoegler *v.* Tel. Co., 350.
Dewart *v.* Masser, 60.
Dewey *v.* Bowman, 51, 52, 54.
Dewire *v.* R. Co., 251, 304.
DeWolf *v.* Ins. Co., 211.
Dexter *v.* R. Co., 270, 272.
Deyo *v.* R. Co., 231, 340.
Dibble *v.* Brown, 84, 271, 272, 278, 281.
Dibble *v.* Morgan, 125, 166, 201.
Dice *v.* Williamette Co., 234, 241.
Dickens *v.* R. Co., 253.
Dickerson *v.* Rogers, 72.
Dickey *v.* Maine Tel. Co., 341.
Dickinson *v.* Winchester, 77, 281.
Dickson *v.* McCoy, 24.
Dickson *v.* R. Co., 142.
Dickson *v.* Tel. Co., 318.
Diehl *v.* Woodruff, 325, 328.
Dietrich *v.* R. Co., 241, 242, 268.
Diggins *v.* Watson, 297.
Dill *v.* R. Co., 271, 285, 287.
Dillard *v.* R. Co., 137, 148, 157, 338.
Diller *v.* Brubaker, 62.
Dillingham *v.* Anthony, 299.
Dillon *v.* R. Co., 49, 341.
Dimmick *v.* R. Co., 47.
Dimmitt *v.* R. Co., 107.
Dinsmore *v.* R. Co., 96.
Directors *v.* Collins, 106.
Ditchett *v.* R. Co., 296.
Dittman & Co. *v.* R. Co., 286.
Dixon *v.* R. Co., 91, 111.
Doak *v.* Bank, 61.
Doane *v.* Russell, 26.
Dobiecki *v.* Sharp, 234.
Dobree *v.* Norcliffe, 53.
Dodge *v.* Boston S. S. Co., 228, 252.
Dodge *v.* Meyer, 22, 160.
Dodge *v.* R. Co., 229.
Doe *v.* Laming, 72.
Doggett *v.* R. Co., 306, 341.
Dolan *v.* Green, 211.
Domingo *v.* Merchants' Ins. Co., 12.
Donald *v.* Luckling, 57, 69.
Donnell *v.* Jones, 344.
Donohoe *v.* Gamble, 62, 66.
Donovan *v.* Gay, 329.
Doorman *v.* Jenkins, 33.
Dorgan *v.* Tel. Co., 319, 320, 342.
Dorr *v.* New Jersey Nav. Co., 139, 140, 160.
Dorr *v.* R. Co., 230.
Dorrah *v.* R. Co., 253.
Doss *v.* R. Co., 312, 348.
Doty *v.* Hawkins, 23.
Doty *v.* Strong, 83, 89.
Dougherty *v.* Posegate, 33.
Dougherty *v.* R. Co., 308, 340.
Douglass *v.* Champlain Trans. Co., 233.
Douglass *v.* Mundine, 58.
Dover *v.* Danville, 341.
Down *v.* Fremont, 136.
Downey *v.* Stacey, 42.
Downs *v.* R. Co., 244, 262.
Downs *v.* Morweord, 26.
Dows *v.* Bank, 51.
Doyle *v.* Keyser, 272.
Doyle *v.* R. Co., 226.
Drake *v.* Kiely, 347.
Drake *v.* Redington, 15.
Drake *v.* White, 13.
Draper *v.* Del. &c. Canal Co., 195.
Drayson *v.* Horne, 143.
Dresbach *v.* R. Co., 104, 201.
Drew *v.* R. Co., 241, 268, 298.
Drew *v.* Red Line Transit Co., 137.
Drew *v.* The Chesapeake, 12.
Drew, The, 206.
Dryden *v.* R. Co., 242.
Dublin &c. R. Co. *v.* Slattery, 234.
Ducker *v.* Barrett, 47.
Duff *v.* R. Co., 225, 312.
Duffy *v.* Thompson, 272.
Dufour *v.* Mefham, 22.
Dugan *v.* Sprague, 59.
Duggins *v.* Watson, 297.

The References are to Sections.

Duke *v.* R. Co., 262.
Du Laurans *v.* R. Co., 255, 260, 261, 347.
Duling *v.* R. Co., 241, 268.
Dunbar *v.* Hughes, 33.
Dunbar *v.* R. Co., 206.
Dunbier *v.* Day, 76, 327.
Duncan *v.* Brennan, 53.
Duncan *v.* Magette, 29.
Duncan *v.* R. Co., 16, 21.
Duncomb *v.* R. Co., 62.
Dunham *v.* Jackson, 60.
Dunham *v.* Kinnear, 41.
Dunham *v.* Lee, 17.
Dunham *v.* R. Co., 110.
Dunlap *v.* Gleason, 8, 29.
Dunlap *v.* Hunting, 22, 209.
Dunlap *v.* Int. Co., 272.
Dunlap *v.* Monroe, 330.
Dunlap *v.* R. Co., 266.
Dunlap *v.* Steam. Co., 275.
Dunlap *v.* Thorne, 82.
Dunlap *v.* Lambert, 211.
Dunn *v.* Branner, 33, 156.
Dunn *v.* New Haven Steam. Co., 289.
Dunn *v.* R. Co., 100, 158, 162, 225, 266.
Dunphy *v.* R. Co., 241, 263.
Dunseth *v.* Wade, 84, 176, 205.
Dunson *v.* R. Co., 104.
Durant *v.* Palmer, 341.
Dutton *v.* Solomonson, 211.
Duval *v.* Mosker, 332.
Duval *v.* Pull. Pal. Car Co., 324.
Dwight *v.* Brewster, 83, 84, 95, 155.
Dwinelle *v.* R. Co., 228, 298.
D'Wolf *v.* Harris, 55.
Dwyer *v.* R. Co., 159, 209.
Dyer *v.* Talcott, 341.
Dykers *v.* Allen, 61, 62.

E.

Eagle *v.* White, 123, 200, 201.
Eagle Packet Co. *v.* Defries, 340.
Earl *v.* Cadmus, 184.
Earle *v.* Grant, 64.
Earnest *v.* Express Co., 133, 137.
East *v.* Ferguson, 27.
East &c. R. Co. *v.* Hall, 112.
East India Co. *v.* Pullen, 112.
East Line &c. R. Co. *v.* Rushing, 269.
Eastman *v.* Avery, 51, 70.
Eastman *v.* Patterson, 45.
Eastman *v.* Sanborn, 42.
Easton *v.* Dorley, 115.
Easton *v.* Hodges, 57.
East Saginaw R. Co. *v.* Bohn, 266.
East Tenn. &c. R. Co. *v.* Brumley, 101.
East Tenn. R. Co. *v.* Green, 340.
East Tenn. &c.R.Co. *v.* Johnson, 135, 142.
East Tenn. R. Co. *v* Montgomery.103
East Tenn. R.Co. *v.* Nelson, 106, 218.
East Tenn. R. Co. *v.* Rogers, 106.
East Tenn. R. Co. *v.* St. John, 314.
East Tenn R. Co. *v.* Whittle, 84, 86, 130, 135.
Eaton *v.* Hodges, 70.
Eaton *v.* Lancaster, 46.
Eaton *v.* Lynde, 15.
Eaton *v.* Newmark, 104, 182.
Eaton *v.* R. Co., 202, 225, 266, 301, 313.
Eckerd *v.* R. Co., 254.
Eddy *v.* Livingston, 10, 30, 33.
Edelman *v.* St. Louis Trans. Co., 348.
Edgerton *v.* R. Co., 266, 312, 340.
Edsall *v.* R. Co., 162.
Edson *v.* Weston, 23, 33.
Edwards *v.* Carr, 42.
Edwards *v.* Lord, 231.
Edwards *v.* Martin, 52.
Edwards *v.* Sheffat, 96.
Edwards *v.* The Cahawba, 339.
Edwards *v.* White Line Transit Co., 131.
Edwin, The, 122, 156, 166.
Eichelberger *v.* Murdock, 53, 55.
Egypt, The, 162, 169.
Ela *v.* Express Co., 206.
Elcox *v.* Hill, 80, 81.
Elder *v.* Reuse, 59.
Eldridge *v.* Adams, 15.
Eldridge *v.* Hill, 33.
Eldridge *v.* R. Co., 308.
Elkins *v.* R. Co., 115, 119.
Elkins *v.* Trans. Co., 142.
Ellett *v.* R. Co., 233.
Elliot *v.* Russell, 84, 125.
Ellis *v.* Narragansett Co., 265.
Ellis *v.* Tel. Co., 316, 317, 319.
Ellsworth *v.* Tartt, 103, 292.
Elmira *v.* Sands, 218, 242.
Elmore *v.* R. Co., 107, 288.
Elsee *v.* Gatward, 10.
Elvira Harbeck, The, 270, 271, 280.
Elwood *v.* Tel. Co., 317, 318.
Emerson *v.* Fisk, 9, 17.
Emery *v.* Hersey, 95.
Emily, The *v.* Carney, 148.
Emma Johnson, The, 84, 166, 337.
Empire Trans. Co. *v.* Oil Co., 139, 162.
Empire Trans. Co. *v.* Wallace, 204.
Engel *v.* Scott, 15.
English *v.* R. Co., 258, 298.
Enrique, The, 166.
Eppendorf *v.* R. Co., 308.
Epps *v.* Hinds, 77, 79, 333.
Erie *v.* Caulkins, 301.
Erie *v.* Schwingle, 341.
Erie Bank *v.* Smith, 58.
Erie Des. Co. *v.* Johnson, 191.
Erie R. Co. *v.* Lockwood, 137, 162, 338.
Erie R. Co. *v.* Wilcox, 101, 106, 134, 137, 139.
Erie Tel. Co. *v.* Grimes, 350.
Erie &c. Trans. Co. *v.* Dater, 137, 148, 154.
Ernst *v.* R. Co., 341.
Esmay *v.* Fanning, 22.
Estes *v.* Boothe, 19, 22.
Ethel, The, 166.
Evans *v.* Davidson, 297.
Evans *v.* R. Co., 86, 130, 242, 266.
Evansville &c. R. Co. *v.* Dexter, 341.

The References are to Sections.

Evansville &c. R. Co. *v.* Duncan, 221, 224, 308.
Evansville &c. R. Co. *v.* Hiatt, 341.
Evansville &c. R.Co. *v.* Young, 140.
Everett *v.* Coffin, 26.
Everett *v.* R. Co., 257, 261.
Everett *v.* South. Ex. Co., 133.
Everleigh *v.* Sylvester, 121.
Ewan *v.* Lippincott, 301.
Ewart *v.* Stark, 82.
Ewart *v.* Street, 123, 124, 337.
Ewing *v.* French, 8.
Express Co. *v.* Caldwell, 158.
Express Co. *v.* Kountze, 137.
Ezell *v.* Miller, 166.
Ezzell *v.* English, 166.

F.

Fahey *v.* R. Co., 84.
Fairchild *v.* Cal. Stage Co., 231, 340, 347.
Fairchild *v.* Rogers, 344.
Fairchild *v.* Slocum, 166.
Fairfax *v.* R. Co., 270, 271, 272, 279, 288.
Fairmount &c. R. Co. *v.* Stutler, 253.
Faith *v.* East India Co., 215.
Falk *v.* R. Co., 253.
Falvey *v.* R. Co., 106, 148.
Fassett *v.* Ruark, 182.
Fatman *v.* R. Co., 205.
Faren *v.* Sellers, 301.
Farewell *v.* R. Co., 242.
Farrish *v.* Reigle, 340, 347.
Farlow *v.* Kelly, 307.
Farmers' &c. Bk. *v.* Champlain Trans. Co., 101, 107, 137, 142, 146, 200.
Farnham *v.* R. Co., 139, 142, 148, 157, 338.
Farrant *v.* Barnes, 330.
Faulkner *v.* Hart, 202.
Faulkner *v.* Hill, 59.
Faucett *v.* Nichols, 81.
Faukner *v.* R. Co., 97, 266.
Faulkner *v.* Wright, 121, 128.
Favorite, The, 166.
Fay *v.* The New World, 5, 83, 246.
Fed. St. R. Co. *v.* Gibson, 340.
Feige *v.* R. Co., 137, 149.
Feitel *v.* R. Co., 340.
Fell *v.* Knight, 73.
Fellowes *v.* Gordon, 10.
Fenner *v.* R. Co., 104, 201, 202.
Ferguson *v.* Brent, 123, 166.
Ferguson *v.* Hubbell, 301.
Ferguson *v.* Lauterstein, 8.
Ferguson *v.* Porter, 10, 30, 33.
Ferguson *v.* Union Furnace Co., 57.
Ferne, The, *v.* Holme, 337.
Ferris *v.* Union Ferry Co., 340.
Fibel *v.* Livingston, 142.
Fick *v.* R. Co., 298.
Field *v.* Brackett, 13, 42.
Field *v.* R. Co., 106, 137.
Field *v.* U. S., 344.
Filer *v.* R. Co., 266, 300, 312.
Filipowski *v.* Merryweather, 80.
Fillebrown *v.* R. Co., 109, 137, 146, 335.
Finch *v.* Mansfield, 211.
Findlay *v.* Tel. Co., 319.
Fink *v.* Furnace Co., 301.
Fink *v.* R. Co., 268.
Finlay *v.* Liverpool S. S. Co., 179.
Finn *v.* R. Co., 134.
Finn *v.* Vallejo, 341.
Finucane *v.* Small, 328, 332.
First National Bank *v.* Graham, 30, 33.
First Nat. Bk. *v.* Kelly, 50, 51.
First Nat. Bk. *v.* Mann, 68.
First Nat. Bk. *v.* Nelson, 51.
First Nat.Bk. *v.* Ocean Bank, 11, 33.
First Nat. Bk. *v.* R. Co., 289.
First Nat.Bank *v.* Root, 57.
First Nat. Bk. *v.* Shaw, 162.
First Nat. Bk. *v.* Tel.Co., 349.
Fish *v.* Chapman, 83, 121, 123, 138, 142, 161.
Fish *v.* Clark, 49, 83.
Fisher, Ex parte, 62.
Fisher *v.* Brown, 52, 61.
Fisher *v.* Clisbee, 84.
Fisher *v.* Fisher, 54, 58.
Fisher *v.* Kelsey, 16, 81.
Fisher *v.* Kyle, 16, 21.
Fisk *v.* Newton, 127, 201, 202.
Fitch *v.* Casler, 74.
Fitch *v.* Newberry, 94, 215.
Fitchburg &c. R. Co. *v.* Hanna, 112.
Fitchburg &c. R. Co. *v.* R. Co., 88.
Fitchburg &c. R. Co. *v.* Sage, 92.
Fitzgerald *v.* Adams Ex. Co., 96.
Fitzgerald *v.* Blocker, 66.
Fitzgerald *v.* Burrell, 330.
Fitzpatrick *v.* R. Co., 226.
Flannery *v.* R. Co., 302.
Fleming *v.* Mills, 107.
Fleming *v.* Northampton Bank, 58.
Fleming *v.* R. Co., 225, 314.
Fletcher *v.* Howard, 51, 70.
Fletcher *v.* R. Co., 293.
Flinn *v.* R. Co., 137, 246, 247, 266.
Flint *v.* Norwich &c. Trans. Co., 302.
Flint *v.* R. Co., 223.
Flint &c. R. Co. *v.* Weir, 246, 271.
Florida &c. R. Co. *v.* Katz, 250.
Flower *v.* R. Co., 312.
Flowers *v.* Sproule, 69.
Floyd *v.* Bovard, 19, 209.
Fluker *v.* R. Co., 300.
Foard *v.* R. Co., 345.
Foltz *v.* Stevens, 19.
Forte *v.* Storrs, 47, 48.
Forbes *v.* Dallett, 338.
Ford *v.* Head, 167.
Ford *v.* Mitchell, 116.
Ford *v.* Parker, 330.
Ford *v.* R. Co., 231.
Ford *v.* Simmons, 332.
Fordham *v.* Co., 309.
Foreman *v.* Drake, 41.
Forsee *v.* R. Co., 261.
Forsyth *v.* R. Co., 234.
Forsythe *v.* Walker, 49.

The References are to Sections.

Forth *v.* Simpson, 27.
Fortier *v.* Penn. Co., 103, 106.
Fortune *v.* Harris, 38.
Fort Worth &c. R. Co. *v.* Rosenthal, 278.
Forward *v.* Pittard, 119, 120, 122, 123, 129.
Fosdick *v.* Green, 8, 36, 344.
Foster *v.* Bush, 5.
Foster *v.* Desfield, 341.
Foster *v.* Dixfield, 341.
Foster *v.* Essex Bank, 5, 8, 33, 76.
Foster *v.* Metts, 330.
Foster *v.* Pettibone, 8.
Foster *v.* Taylor, 43.
Foulkes *v.* R. Co., 291.
Fowler *v.* Davenport, 166, 198.
Fowler *v.* Dorlon, 80.
Fowler *v.* Lock, 24.
Fowler *v.* Tel. Co., 316, 317, 319, 320, 342.
Fowles *v.* R. Co., 101.
Fox *v.* Glastenbury, 341.
Fox *v.* McGregor, 26, 82.
Fox *v.* R. Co., 102.
Fragano *v.* Long, 211.
Fraker *v.* Reeve, 50, 66.
Francis *v.* Castleman, 40.
Francis *v.* Cockrell, 24, 236, 301.
Francis *v.* Joseph, 54.
Francis *v.* R. Co., 40, 201, 202.
Francis *v.* St. Louis Trans. Co., 346, 347.
Francis *v.* Schrader, 41.
Francis *v.* Tel. Co., 351.
Frank *v.* Hoey, 211.
Frank *v.* Ingalls, 240.
Franklin *v.* Northwestern Telephone Co., 323.
Franklin Sav. Inst. *v.* Preetorius, 65.
Frankner *v.* Reeve, 52.
Fraser *v.* Freeman, 297.
Frazier *v.* R. Co., 91.
Frech *v.* R. Co., 341.
Freeburg &c. Coal Co. *v.* R. Co., 100, 103.
Freedman *v.* Tel. Co., 316.
Freedom, The, 166, 170, 337.
Freeman *v.* Newton, 116.
Freeman *v.* R. Co., 296.
French *v.* Brunswick, 341.
French *v.* R. Co., 139, 162, 338.
French *v.* Star Union Trans. Co., 131.
Frick *v.* R. Co., 314, 347.
Fridley *v.* Bowen, 53, 55.
Friedenrich *v.* R. Co., 243.
Friederick *v.* R. Co., 244.
Friend *v.* Woods, 120, 122, 166.
Frink *v.* Coe, 231.
Frink *v.* Potter, 231, 308, 340.
Frink *v.* Schroyer, 347.
Fromont *v.* Coupland, 103.
Frost *v.* Plumb, 21.
Frost *v.* R. Co., 254, 300.
Frost *v.* Shaw, 52.
Fry *v.* R. Co., 347.
Fulks *v.* R. Co., 341.
Fuller *v.* Bradley, 27, 84.
Fuller *v.* Coats, 76, 80, 81.
Fuller *v.* Curtiss, 344.
Fuller *v.* R. Co., 84, 347.
Fulton *v.* Alexander, 33.
Fulton *v.* R. Co., 260.
Fulton F. I. Co. *v.* Baldwin, 330.
Fune *v.* R. Co., 211.
Funkhouser *v.* Wagner, 332.
Furber *v.* Barnes, 33.
Furlow *v.* Gillian, 8.
Furman *v.* R. Co., 131, 206.
Furstenheim *v.* R. Co., 291.

G.

Gaff *v.* O'Neil, 41.
Gage *v.* Terrell, 84, 156.
Gage *v.* Tirrell, 161.
Gailes *v.* Hallman, 118.
Gaines *v.* Union Trans. Co., 137, 335, 338.
Gaither *v.* Barnet, 161.
Gale *v.* R. Co., 241.
Galena R. Co. *v.* Fay, 231, 304, 341.
Galena &c. R. Co. *v.* Jacobs, 341.
Galena &c. R. Co. *v.* Rae, 91, 92, 97, 215, 345.
Galena &c. R. Co. *v.* Yarwood, 340.
Gallena *v.* R. Co., 298.
Gallin *v.* R. Co., 192.
Galt *v.* Adams Ex. Co., 137.
Galveston &c. R. Co. *v.* Allison, 100.
Galveston &c. R. Co. *v.* Boothe, 158.
Galveston &c. R. Co., *v.* Donohoe, 298.
Galveston &c. R. Co. *v.* Kinnebrew, 255.
Galveston &c. R. Co. *v.* Smith, 312.
Gamber *v.* Wolaver, 43.
Gamble *v.* R. Co., 289.
Ganley *v.* Troy City Bk., 22.
Ganmon *v.* Union Ferry Co., 307.
Gantret *v.* Egerton, 230.
Garbracht *v.* Com., 211.
Garden Grove Bk. *v.* R. Co., 160.
Gardner *v.* R. Co., 225, 296.
Gardner *v.* Smith, 294.
Garland *v.* Lane, 211.
Garlick *v.* James, 51, 52, 58, 62.
Garretzen *v.* Duenckel, 297.
Garrignes *v.* Coxe, 166.
Garrison *v.* Memphis Ins. Co., 166.
Garten *v.* R. Co., 92.
Gashweiler *v.* R. Co., 202.
Gass *v.* R. Co., 103, 104.
Gastenhofer *v.* Clair, 74.
Gaty *v.* Holliday, 56.
Gauche *v.* Storer, 170.
Gavette *v.* R. Co., 308.
Gawley *v.* R. Co., 308.
Gay *v.* Moss, 51, 62 .
Gay *v.* Winter, 341.
Gaynor *v.* R. Co., 234, 341.
Gee *v.* R. Co., 307.
Geismer *v.* Lake Shore &c. R. Co., 204.
Gelley *v.* Clarke, 74.
General Steam Nav. Co. *v.* Morrison, 12.
Genet *v.* Howland, 60.
George *v.* R. Co., 340.
Georgia *v.* R. Co., 340.
Georgia R. Co. *v.* Beatie, 137.

The References are to Sections.

Georgia R. Co. *v.* Gann, 137, 140.
Georgia R. Co. *v.* Hayden, 346.
Georgia &c. R. Co. *v.* McCurdy, 312, 347.
Georgia R. Co. *v.* Murray, 110.
Georgia R. Co. *v.* Spears, 137, 140.
Gerety *v.* R. Co., 304.
Geron *v.* Geron, 56, 61.
Gerstle *v.* R. Co., 306.
German *v.* R. Co., 86, 156, 157.
Germania Fire Ins. Co. *v.* R. Co., 147, 148, 160.
Germania Ins. Co. *v.* The Lady Pike, 120.
Germantown Pass. Co. *v.* Brophy, 307.
Germantown R. Co. *v.* Walling, 306.
Gettings *v.* Nelson, 51.
Ghormley *v.* Dinsmore, 149, 158.
Gibbon *v.* Paynton, 133, 142.
Gibbs *v.* Chase, 16.
Giblin *v.* McMullin, 11, 33.
Gibson *v.* Am. Ex. Co., 101, 149, 185.
Gibson *v.* Culver, 200, 201.
Gibson *v.* Hatchett, 13, 40.
Gibson *v.* Leonard, 329.
Gibson *v.* Martin, 61.
Gibson *v.* R. Co., 260.
Gibson *v.* Sturge, 213.
Giglio, The *v.* The Britannia, 172.
Gilbart *v.* Dale, 332.
Gilbert *v.* Beach, 301.
Gilbert *v.* Hoffman, 75.
Gilbert *v.* Manchester Co., 22.
Gille *v.* Libby, 76, 81.
Giles *v.* Fauntleroy, 78, 79.
Giles *v.* Grover, 15.
Giles *v.* R. Co., 269.
Gilhooly *v.* N. Y. &c. St. Co., 286.
Gill *v.* R. Co., 103.
Gillenwater *v.* R. Co., 226, 246.
Gillespie *v.* R. Co., 337, 340.
Gillet *v.* Ellis, 120.
Gilliat *v.* Lynch, 53.
Gillingham *v.* R. Co., 298, 299.
Gillis *v.* R. Co., 230.
Gillis *v.* Tel. Co., 317, 320.
Gillshannon *v.* R. Co., 226.
Gilmore *v.* Carman, 84, 122, 123, 166,
Gilpin *v.* Howell, 61.
Gilson *v.* Martin, 55.
Gilson *v.* Gwinn, 215.
Ginnon *v.* R. Co., 308.
Girard Fire Ins. Co. *v.* Marr, 58.
Gisbourn *v.* Hurst, 83.
Given *v.* Tel. Co., 317.
Glasco *v.* R. Co., 270, 271, 291.
Gleadell *v.* Thomson, 162, 174.
Gleason *v.* Beers, 39, 43.
Gleason *v.* Bremen, 341.
Gleason *v.* Drew, 51.
Gleason *v.* Goodrich Trans. Co., 135, 143, 255, 272, 289.
Gleason *v.* Virginia Co., 338.
Gleeson *v.* R. Co., 120.
Glenn *v.* South. Ex. Co., 158.
Glover *v.* Burbridge, 33.
Glovinsky *v.* Cunard Co., 272.
Goddard *v.* Mallory, 115, 205.
Goddard *v.* R. Co., 298, 299, 302, 345, 348.
Goddard, The F. H., 170.
Godfrey *v.* R. Co., 295.
Goetz *v.* R. Co., 263.
Goggin *v.* R. Co., 137, 153, 158.
Goines *v.* McCandless, 265.
Golden *v.* Newbrand, 297.
Goldey *v.* R. Co., 139, 247.
Gold Hunter, The, 166.
Goldschmidt *v.* Worthington &c. Trustees, 64.
Goldsmith *v.* R. Co., 101.
Goldstein *v.* Hort, 51, 54.
Goldstein *v.* R. Co., 230.
Good *v.* R. Co., 158.
Goodall *v.* Richardson, 58.
Goodfellow *v.* Meegan, 332.
Goodfellow *v.* R. Co., 230.
Goodrich *v.* Hubbard, 344.
Goodrich *v.* Thompson, 115, 127, 205,
Goodsell *v.* Taylor, 329.
Goodwin *v.* R. Co., 201.
Goold *v.* Chapin, 200.
Gordan *v.* Buchanan, 166, 337.
Gordan *v.* R. Co., 227.
Gorman *v.* Campbell, 21.
Gordon *v.* Hutchinson, 83, 84.
Gordon *v.* Little, 139.
Gordon *v.* R. Co., 162, 238, 246.
Gore *v.* Trans. Co., 289.
Gorham Manf. Co. *v.* Fargo, 133, 134.
Gormley *v.* R. Co., 341.
Gosling *v.* Birnie, 19.
Gosling *v.* Higgins, 131.
Gosway *v.* R. Co., 297.
Gott *v.* Dinsmore, 137, 156.
Gouger *v.* Jolly, 154.
Gould *v.* Chapin, 104.
Gould *v.* Hill, 139.
Gould *v.* Central Trust Co., 57.
Gould *v.* R. Co., 256.
Gowdy *v.* Lyon, 160, 170.
Grace *v.* Adams, 137, 147, 149, 154, 160.
Grace *v.* Palmer, 26.
Gradin *v.* R. Co., 225 .
Graffam *v.* R. Co., 280.
Graffenreid *v.* R. Co., 295.
Graham *v.* Davis, 137, 161, 338.
Graham *v.* R. Co., 230, 347, 348.
Grand Rapids R. Co., *v.* Huntley, 236.
Grand &c. R. Co. *v.* Boyd, 232.
Grand &c. R. Co. *v.* Ullman, 112.
Grand Trunk R. Co. *v.* Stevens, 247.
Grange *v.* Tel. Co., 342.
Grant *v.* Baker, 341.
Grant *v.* Ludlow, 33.
Grant *v.* Newton, 272.
Grant *v.* Wood, 213.
Granite Bank *v.* Richardson, 59, 65.
Graves *v.* Hartford Steam Co., 202.
Graves *v.* R. Co., 142.
Graves *v.* Smith, 22.
Graves *v.* Ticknor, 10.
Gray *v.* Carr, 215.
Gray *v.* Com., 72.
Gray *v.* Harper, 160.
Gray *v.* Jackson, 103, 106, 107.
Gray *v.* Merriam, 31, 33.

The References are to Sections.

Gray *v.* R. Co., 265.
Gruber *v.* R. Co., 293.
Great North. R. Co. *v.* Hanson, 225.
Great North. R. Co. *v.* Shepherd, 272, 278.
Great West. R. Co. *v.* Blake, 291, 292, 293.
Great West. R. Co. *v.* Blower, 86, 130.
Great West. R. Co. *v.* Burns, 91.
Great West. R. Co. *v.* Crouch, 205.
Great West. R. Co. *v.* Hawkins, 135.
Great West. R. Co. *v.* Miller, 257, 260.
Great West. R. Co. *v.* Sutton, 92.
Great West. R. Co. *v.* Redmayne, 345.
Green *v.* Birchard, 5.
Green *v.* Buchard, 33.
Green *v.* Clark, 211.
Green *v.* Dunn, 209.
Green *v.* Hollingsworth, 16, 22, 33, 38.
Green *v.* The Bridgeton, 265.
Green *v.* R. Co., 116, 234, 282, 283.
Greenleaf *v.* R. Co., 341.
Gregory *v.* R. Co., 139.
Gregory *v.* Stryker, 8.
Grethen *v.* R. Co., 314.
Grey *v.* Mobile Trade Co., 137, 162.
Grey *v.* Pullen, 301.
Griffith *v.* Cave, 84.
Griffith *v.* Ingledew, 211.
Griffith *v.* Zipperwick, 33.
Griffiths *v.* Wolfram, 301.
Grill *v.* Gen. Iron Screw Co., 166.
Grindle *v.* Ex. Co., 205.
Grinnell *v.* Cook, 27, 76, 82.
Grinnell *v.* Tel. Co., 319.
Griswold *v.* Ins. Co., 213.
Griswold *v.* R. Co., 240, 248, 249.
Grogan *v.* Adams Ex. Co., 139, 142, 334, 337.
Gronstadt *v.* Witthoff, 162.
Grosvenor *v.* R. Co., 112, 113.
Grover &c. Machine Co. *v.* R. Co., 107.
Grover &c. Co. *v.* R. Co., 115.
Guillaume *v.* Gen. Trans. Co., 156.
Guillaume *v.* Hamburg &c. Co., 139, 162, 174, 206.
Guinn *v.* R. Co., 204.
Gulf &c. R. Co. *v.* Baird, 101.
Gulf &c. R. Co. *v.* Campbell, 266.
Gulf &c. R. Co. *v.* Coon, 347.
Gulf &c. R. Co. *v.* Gawn, 158.
Gulf &c. R. Co. *v.* Golding, 100, 162.
Gulf &c. R. Co. *v.* Hume, 158.
Gulf &c. R. Co. *v.* Levy, 316, 349, 350.
Gulf &c. R. Co. *v.* McGown, 137, 139, 240, 248.
Gulf &c. R. Co. *v.* Moody, 255, 258, 268.
Gulf &c. R. Co. *v.* Roundtree, 253.
Gulf &c. R. Co. *v.* Schieder, 341.
Gulf &c. R. Co. *v.* Shields, 302.
Gulf &c. R. Co. *v.* Trawick, 86, 137, 158.
Gulf &c. R. Co. *v.* Wallen, 308.
Gulf &c. R. Co. *v.* Wilbanks, 100.
Gulf &c. R. Co. *v.* Wilhelm, 159.
Gulf &c. R. Co. *v.* Wilson, 100, 225, 320.
Gulledge *v.* Howard, 30, 33.
Gulliver *v.* Adams Ex. Co., 84, 112, 201.
Gurney *v.* R. Co., 272.

H.

Haach *v.* Fearing, 297.
Haas *v.* Kas. City R. Co., 204.
Hackett *v.* R. Co., 121.
Hadd *v.* U. S. Ex. Co., 101, 107.
Hadencamp *v.* R. Co., 306.
Hadji, The, 142, 162, 164.
Hadley *v.* Baxendale, 345, 349.
Hadley *v.* Cross, 24, 232.
Hadley *v.* Tel. Co., 318, 349.
Hadley *v.* Upshaw, 80.
Haebrik *v.* Carr, 228.
Hagan *v.* R. Co., 348.
Hagebush *v.* Ragland, 38.
Hagerstown Bk. *v.* Adams Ex. Co., 212, 297.
Haggerty *v.* R. Co., 76, 115, 290.
Haigh *v.* Brooks, 32.
Haines *v.* R. Co., 272, 275.
Hale *v.* Barrett, 26.
Hale *v.* New Jersey Steam. Co., 84, 121, 137, 162.
Haley *v.* R. Co., 260, 269.
Hall *v.* Cheney, 121, 122, 129.
Hall *v.* DeCuir, 265.
Hall *v.* Pike, 72, 74, 327.
Hall *v.* Power, 297.
Hall *v.* R. Co., 22, 101, 108, 118, 186, 188, 240, 242, 274, 338.
Hall *v.* Renfro, 84, 86, 119, 130.
Hall *v.* Warner, 9.
Hallenbake *v.* Fish, 76.
Halliday *v.* R. Co., 105, 108.
Hallock *v.* Mallett, 13.
Halty *v.* Markel, 45.
Halwerson *v.* Cole, 213.
Halyard *v.* Dechelman, 43.
Hamburg Pack. Co. *v.* Gattman, 271.
Hamilton *v.* Elstner, 47.
Hamilton *v.* McLaughlin, 26.
Hamilton *v.* R. Co., 156, 230, 241, 244, 347.
Hamilton *v.* State Bank, 64.
Hamlin *v.* R. Co., 237, 345, 346.
Hammond *v.* McClure, 337.
Hammond *v.* R. Co., 225.
Hampton *v.* Pull. Pal. Car Co., 325, 328.
Hancock *v.* Franklin Ins. Co., 60, 62.
Hancock *v.* Rand, 74, 76, 327.
Hand *v.* Baynes, 127, 205, 345.
Handford *v.* Palmer, 25, 42.
Hanna *v.* Holton, 52, 58.
Hanna *v.* Phelps, 26, 27.
Hannibal &c. R. Co. *v.* Martin, 227.
Hannibal &c. R. Co. *v.* Swift, 84, 218, 224, 270, 271, 272, 274, 289.
Hanley *v* R. Co., 217, 233.
Hanley *v.* Smith, 78.
Hansen *v.* R. Co., 266.
Hansley *v.* R. Co., 345.
Hansom *v.* R. Co., 298.
Hanson *v.* R. Co., 103, 115, 266, 298, 312, 348.

The References are to Sections.

Hardegg *v.* Willards, 10.
Hardenbergh *v.* R. Co., 251.
Harding *v.* Int. &c. Nav. Co., 101.
Harding *v.* The Maverick, 12.
Harding *v.* Lowshend, 347.
Hardman *v.* Brett, 118.
Hardy *v.* Jaudon, 61.
Hare *v.* Fuller, 15.
Harker *v.* Dement, 68, 209.
Harkness *v.* Tel. Co., 319, 342.
Harlow *v.* Humiston, 341.
Harmony *v.* Bingham, 205.
Harold *v.* R. Co., 254.
Harp *v.* The Grand Era, 103.
Harper *v.* Goodsell, 28.
Harper *v.* Milwaukee, 301.
Harper *v.* Second Bank, 58.
Harrington *v.* King, 8, 15.
Harrington *v.* Lyles, 84, 121.
Harrington *v.* McShane, 84, 95, 98.
Harrington *v.* Snyder, 13, 16, 24.
Harris *v.* Howe, 290, 292.
Harris *v.* Lombard, 51.
Harris *v.* Packwood, 90, 136, 142.
Harris *v.* R. Co., 86, 103, 107, 130, 307.
Harris *v.* Rand, 120, 213.
Harris *v.* Stevens, 227, 264.
Harris *v.* Tel. Co., 318, 319.
Harris *v.* Woodruff, 27.
Harrison *v.* Collins, 301.
Harrison *v.* R. Co., 115.
Harrison *v.* Ray, 83.
Hart *v.* Allen, 84, 125.
Hart *v.* Bush, 211.
Hart *v.* Skinner, 21.
Hart *v.* R. Co., 103, 118, 137, 135, 142, 159, 291.
Hart *v.* Tel. Co., 320, 349.
Hart *v.* Ten Eyck, 62.
Hartan *v.* R. Co., 288, 292.
Harter *v.* Blanchard, 25.
Hartford *v.* Johnson, 24.
Hartshorne *v.* Johnston, 215.
Hartwell *v.* N. Pac. Ex. Co., 149.
Harvey *v.* Murray, 13.
Harvy *v.* Pike, 166.
Harvey *v.* R. Co., 142.
Harvey *v.* Rose, 84, 135.
Hasbrouck *v.* Vandervoort, 51, 52, 69.
Haskins *v.* Patterson, 51, 64.
Haslam *v.* Adams Ex. Co., 84, 201.
Hassam *v.* Ins. Co., 214.
Hastings *v.* Pepper, 84, 130.
Hastings *v.* R. Co., 156.
Hatcher *v.* R. Co., 296.
Hatchett *v.* Gibson, 13, 40, 47.
Hatchett *v.* The Compromise, 166, 176.
Hathaway *v.* Brady, 8.
Hathaway *v.* R. Co., 341.
Hatton *v.* R. Co., 241.
Haven *v.* Low, 51.
Hawcroft *v.* R. Co., 221, 238, 250.
Hawes *v.* Knowles, 297.
Hawkins *v.* Hoffman, 270, 271, 272.
Hawkins *v.* R. Co., 135, 139, 190.
Hawks *v.* Locke, 24.
Hawthorn *v.* Hammond, 73.
Hay *v.* R. Co., 303.
Hayes *v.* Wells, 14, 84, 133, 206.
Haynie *v.* Waring, 33.
Hays *v.* Gallagher, 341.
Hays *v.* Kennedy, 121, 123, 134, 166, 338.
Hays *v.* Millar, 85.
Hays *v.* R. Co., 92, 262.
Hays *v.* Riddle, 70.
Hazard *v.* R. Co., 266, 312.
Hazman *v.* Hoboken Land Co., 309.
Heard *v.* Brewer, 51.
Healey *v.* Gray, 76, 80.
Healing *v.* Cottrell, 58.
Healy *v.* R. Co., 257.
Heath *v.* R. Co., 265, 295.
Heath *v.* Silverthorn Co., 52, 70.
Heaton *v.* R. Co., 137.
Hedges *v.* R. Co., 202.
Hegeman *v.* R. Co., 231, 232, 235, 236, 340.
Heil *v.* R. Co., 107, 191, 338.
Heineman *v.* R. Co., 139, 229.
Heiman *v.* Tel. Co., 320.
Heirn *v.* McCaughan, 237, 250, 348.
Helene, The, 172.
Helliwill *v.* R. Co., 100, 103.
Hellman *v.* Holladay, 153, 271, 275.
Helsby *v.* Mears, 155.
Hemmingway *v.* R. Co., 253, 269.
Hemphill *v.* Cheney, 201.
Hendricks *v.* R. Co., 267, 302.
Hendrix *v.* Harman, 68.
Hendryx *v.* R. Co., 225.
Henderson *v.* R. Co., 310.
Henderson *v.* Stevenson, 240.
Henderson *v.* The Maid of Orleans, 345.
Henley *v.* Mayor, 330.
Henry *v.* Patterson, 8.
Henry *v.* R. Co., 84, 347.
Hensel *v.* Noble, 26.
Herbert *v.* Markwell, 80.
Herlihy *v.* Smith, 24.
Herman *v.* Drinkwater, 21.
Hermann *v.* Goodrich, 104, 201.
Herman *v.* Maxwell, 56.
Hermann *v.* West. Union Tel. Co., 158.
Herrick *v.* Gallagher, 208.
Herron *v.* Tel. Co., 318.
Hersh *v.* R. Co., 92.
Heryford *v.* Davis, 8.
Hestonville R. Co. *v.* Shields, 63.
Hewett *v.* R. Co., 126, 160.
Hewett *v.* Swift, 297, 298.
Hewlett *v.* Tel. Co., 320.
Hexamer *v.* Southal, 46.
Hexamer *v.* Webb, 301.
Heyland *v.* Badger, 51.
Hibbard *v.* R. Co., 255, 256, 262.
Hibernia Ins. Co. *v.* St. Louis &c. R. Co., 166.
Hibler *v.* McCartney, 166.
Hickey *v.* R. Co., 341.
Hickman *v.* R. Co., 269.
Hickman *v.* Thomas, 26, 327.
Hickok *v.* Buck, 24.
Hickox *v.* R. Co., 112, 116, 272, 281, 284, 285.

The References are to Sections.

Hicks *v.* R. Co., 341.
Hide *v.* Proprietors, 136.
Higgins *v.* Emmons, 22.
Higgins *v.* R. Co., 137, 225, 226, 248, 257, 297.
Higgins *v.* Watervliet Tp. Co., 267, 298.
Highly *v.* Gilmer, 225.
Hill *v.* Finigan, 63.
Hill *v.* New Haven, 341.
Hill *v.* Owen, 333.
Hill *v.* R. Co., 109, 110, 142, 147, 156, 242, 304.
Hill *v.* Spear, 211.
Hill *v.* Sturgeon, 166, 337, 338.
Hill *v.* Tel. Co., 320.
Hill *v.* Wiggins, 29.
Hill Mfg. Co. *v.* R. Co., 100, 103, 201.
Hilliard *v.* Goold, 261.
Hilliard *v.* Richardson, 301.
Hillis *v.* R. Co., 289, 328.
Hills *v.* Daniels, 33.
Hills *v.* Matchill, 166.
Hillyard *v.* Crabtree, 43.
Hilton *v.* Adams, 76, 79.
Hilton *v.* Waring, 58.
Hinckley *v.* R. Co., 160.
Hinton *v.* Dibbin, 11.
Hirsch *v.* Quaker City, 201.
Hirschburg *v.* Dinsmore, 158.
Hirschon *v.* Packet Co., 270, 272.
Hirsh *v.* The Quaker City, 202.
Hirshfield *v.* R. Co., 201.
Historian, The, 170.
Hoadley *v.* Northern Trans. Co., 126, 137, 147, 148, 154, 162.
Hoar *v.* R. Co., 225.
Hoare *v.* Parker, 54.
Hobart *v.* Littlefield, 211.
Hobbs *v.* R. Co., 250, 266, 346, 350.
Hobson *v.* R. Co., 341.
Hockett *v.* State, 323.
Hocum *v.* Weitherick, 341.
Hoeger *v.* R. Co., 278, 286.
Hoffbauer *v.* R. Co., 255, 256, 260.
Holbrook *v.* Baker, 55.
Holbrook *v.* R. Co., 307, 340.
Holbrook *v.* Wight, 19, 26, 27, 209.
Holdridge *v.*R. Co., 286, 287.
Hole *v.* R. Co., 301.
Holford *v.* Adams, 90.
Holl *v.* Griffin, 19.
Hollingworth *v.* Brodrick, 125.
Hollingsworth *v.* Dow, 26.
Hollister *v.* Central Nat. Bk., 31.
Hollister *v.* Nowlen, 84, 112, 119, 133, 136, 139, 140, 143, 146, 217, 218, 231, 270, 271.
Holly *v.* R. Co., 302.
Holmes *v.* Crane, 51.
Holmes *v.* R. Co., 230.
Holmes *v.* Wakefield, 257, 297, 298.
Holsapple *v.* R. Co., 139, 162.
Holt *v.* Westcott, 213.
Holtzclaw *v.* Duff, 47, 49.
Holyoke *v.* R. Co., 347.
Holzab *v.* R. Co., 315.
Homes *v.* Crane, 70.
Homer *v.* Thwing, 21.
Honkley *v.* R. C., 101.
Hood *v.* R. Co., 107, 285, 291.
Hooks *v.* Smith, 16, 21.
Hooper *v.* R. Co., 211.
Hooper *v.* Wells, 84, 123, 140, 162.
Hoover *v.* Barkhoof, 330.
Hope *v.* Lawrence, 63, 66.
Hopkins *v.* Connell, 295.
Hopkins *v.* R. Co., 160, 341, 347, 348.
Hopkins *v.* Westcott, 142, 184, 270, 272.
Hopper *v.* Miller, 15.
Horne *v.* Meakin, 24.
Horsely *v.* Branch, 16.
Horton *v.* Morgan, 61.
Hosea *v.* McCrory, 95.
Hosmer *v.* Clark, 29.
Hospes *v.* R. Co., 340.
Hostetter *v.* Gray, 166.
Hostetter *v.* R. Co., 160.
Hostler *v.* Skull, 19.
Hot Springs R. Co. *v.* Trippe, 103.
Houck *v.* R. Co., 265.
Hough *v.* R. Co., 341.
Houser *v.* Kemp, 52.
Houser *v.* Houser, 58.
Houser *v.* Tully, 74, 76.
Houston &c. R. Co. *v.* Adams, 205.
Houston &c. R. Co. *v.* Burke, 137.
Houston &c. R. Co. *v.* Clemens, 220, 306.
Houston &c. R. Co. *v.* Cowser, 341.
Houston &c. R.Co. *v.* Gorbett, 253.
Houston &c. Co. *v.* Hill, 346.
Houston &c. R. Co. *v.* Jackson, 345.
Houston &c. R. Co. *v.* Moore, 225, 255, 266.
Houston &c. R. Co. *v.* Park, 103, 137.
Houston &c. R. Co. *v.* Rust, 92.
Houston &c. R. Co. *v.* Smith, 345.
Houston &c. R. Co. *v.* Sympkins, 341.
Houston &c. R. Co. *v.* Washington, 298.
Houton *v.* Holliday, 56, 61.
Howard *v.* Babcock, 38.
Howard *v.* Cobb, 250.
Howard *v.* Farr, 15.
Howard *v.* Roeben, 8, 29.
Howard *v.* Steam. Co., 206.
Howard, The, *v.* Wissman, 170.
Howe Machine Co. *v.* Bryson, 344.
Howe Machine Co. *v.* Pease, 76.
Howell *v.* Jackson, 73.
Howell *v.* Morlan, 20.
Howell *v.* Morton, 48.
Howth *v.* Franklin, 72, 76.
Hoy *v.* Gronoble, 344.
Hoyt *v.* Hudson, 341.
Hubener *v.* R. Co., 308.
Hubbard *v.* Coolidge, 32.
Hubbard *v.* Harnden's Ex. Co., 129.
Hubbard *v.* Rowell, 344.
Hubbard *v.* Tel. Co., 319, 349.
Hubbell *v.* Drexel, 61.
Hudson *v.* R. Co., 158, 243.
Hudston *v.* R. Co., 272.
Huey *v.* Gahlenbeck, 329.
Huff *v.* R. Co., 308.
Hufford *v.* R. Co., 244, 258.
Hughes *v.* Boyer, 14, 42.

The References are to Sections.

Hughes *v.* R. Co., 301, 302.
Hulbert *v.* R. Co., 228, 234.
Hulett *v.* Swift 76.
Hull *v.* R. Co., 137, 250.
Hulsenkamp *v.* R. Co., 231.
Hume *v.* Tufts, 15.
Humphrey *v.* Reed, 19, 84, 337.
Humphreys *v.* Perry, 275, 278.
Hunnewell *v.* Tabor, 137, 162.
Hunsaker *v.* Sturgis, 56.
Hus *v.* Kempf, 109.
Hunt *v.* Haskell, 26, 214.
Hunt *v.* Holton, 57.
Hunt *v.* Morris, 122.
Hunt *v.* Nevers, 67, 71.
Hunt *v.* R. Co., 301.
Hunt *v.* The Cleveland, 334, 337.
Hunt *v.* Wyman, 5, 8.
Hunter *v.* Potts, 125.
Hunter *v.* Wright, 211.
Huntingdon *v.* Dinsmore, 149.
Huntington *v.* English, 344.
Huntress, The, 134, 206.
Hurd *v.* West, 8, 22, 23.
Hurst *v.* Byers, 82.
Hurst *v.* Coley, 55.
Hurst *v.* R. Co., 238.
Hurt *v.* R. Co., 253.
Hutchings *v.* Ladd, 109.
Hutchings *v.* R. Co., 270, 272.
Hutchins *v.* Brackett, 330.
Hutchins *v.* Olcott, 26, 27.
Hutchinson *v.* R. Co., 132, 148, 157.
Hutchison *v.* R. Co., 137.
Hutton *v.* Arnett, 70.
Hutton *v.* Osborne, 83.
Hyatt *v.* Taylor, 81.
Hyde *v.* Cookson, 8.
Hyde *v.* Noble, 15.
Hyland *v.* Paul, 13, 33, 42.
Hyde *v.* Mich. Refri'g Co., 344.
Hyde *v.* Trent. Nav. Co., 84, 122, 136.

I.

Idaho, The, 209.
Ill. Cent. R. Co. *v.* Able, 312.
Ill. Cent. R. Co. *v.* Adams, 137, 139, 162.
Ill. Cent. R. Co. *v.* Clayton, 285.
Ill. Cent. R. Co. *v.* Copeland, 106, 272, 288, 291, 292.
Ill. Cent. R. Co. *v.* Cowles, 106.
Ill. Cent. R. Co. *v.* Cunningham, 347.
Ill. Cent. R. Co. *v.* Demars, 346.
Ill. Cent. R. Co. *v.* Finnigan, 296.
Ill. Cent. R. Co. *v.* Frankenberg, 106, 137, 140.
Ill. Cent. R. Co. *v.* Frelka, 230.
Ill. Cent. R. Co. *v.* Godfrey, 230.
Ill. Cent. R. Co. *v.* Hall, 135.
Ill. Cent. R. Co. *v.* Handy, 325, 328.
Ill. Cent. R. Co. *v.* Johnson, 106, 266.
Ill. Cent. R. Co. *v.* Joute, 101, 109, 137, 140, 149.
Ill. Cent. R. Co. *v.* Jute, 139.
Ill. Cent. R. Co. *v.* Latham, 297.
Ill. Cent. R. Co. *v.* Mechan, 266.
Ill. Cent. R. Co. *v.* McClellan, 194.
Ill. Cent. R. Co. *v.* Mitchell, 104.
Ill. Cent. R. Co. *v.* Morrison, 137, 139.
Ill. Cent. R. Co. *v.* Nelson, 266.
Ill. Cent. R. Co. *v.* Phillips, 236.
Ill. Cent. R. Co. *v.* Read, 137, 139, 246, 248.
Ill. Cent. R. Co. *v.* Slatton, 308.
Ill. Cent. R. Co. *v.* Smyser, 112, 113, 114, 116, 137, 139.
Ill. Cent. R. Co. *v.* Stables, 347.
Ill. Cent. R. Co. *v.* Sutton, 257, 266.
Ill. Cent. R. Co. *v.* Whittemore, 257, 262, 348.
Independence Mills Co. *v.* R. Co., 105, 201.
Indiana &c. R. Co. *v.* Hudelson, 227.
Indiana &c. R. Co. *v.* Munday, 162, 246, 248.
Indianapolis &c. R. Co. *v.* Allen, 137, 190.
Indianapolis &c. R. Co. *v.* Anthony, 298.
Indianapolis &c. R. Co. *v.* Beaver, 266.
Indianapolis &c. R. Co. *v.* Binard, 218.
Indianapolis &c. R. Co. *v.* ——, 217.
Indianapolis &c. R. Co. *v.* Birney, 250, 346, 347.
Indianapolis &c. R. Co. *v.* Cox, 140, 150, 270.
Indianapolis &c. R. Co. *v.* Holst, 341.
Indianapolis &c. R. Co. *v.* Horst, 266, 312.
Ind. &c. R. Co. *v.* Juntgen, 204.
Ind. &c. R. Co. *v.* Jurey, 86.
Indianapolis &c. R. Co. *v.* Kennedy, 261, 266.
Indianapolis &c. R. Co. *v.* Keely, 341.
Indianapolis &c. R. Co. *v.* Pitzer, 269.
Indianapolis &c. R. Co. *v.* Remmy, 160.
Indianapolis &c. R. Co. *v.* Rinard, 261, 266.
Indianapolis &c. R. Co. *v.* Rutherford, 303, 307.
Indianapolis &c. R. Co. *v.* Strain, 102, 139.
Ingalls *v.* Bills, 24, 231, 232, 308.
Ingalls *v.* Brooks, 127.
Ingalls *v.* Van Bokkelen, 70.
Ingate *v.* Christie, 84.
Ingallsbee *v.* Wood, 76.
Inglebright *v.* Hammond, 8.
Ingledew *v.* R. Co., 345.
Inhabitants *v.* Hall, 107.
Inhoff *v.* R. Co., 229, 253.
Insurance Co. *v.* St. Louis &c. R. Co., 162.
International &c. R. Co. *v.* Cock, 266.
International &c. R. Co. *v.* Hassell, 241, 312.
International &c. R. Co. *v.* Miller, 300.
International &c. R. Co. *v.* Moody, 108.
International &c. R. Co. *v.* Prince, 266.
International &c. R. Co. *v.* Terry, 347.
International &c. R. Co. *v.* Tisdale, 204.
International &c. R Co. *v* Underwood, 158

The References are to Sections.

International &c. R. Co. *v.* Wilkes, 262.
Invincible, The, 137, 162, 338.
Ionic, The, 272.
Iowa Union Telephone Co. *v.* Board of Equalization, 323.
Irish *v.* R. Co., 102, 104, 107.
Irons *v.* Kentner, 40, 47.
Iron R. Co. *v.* Mowry, 308, 340.
Irwin *v.* Sprigg, 341.
Isaacs *v.* R. Co., 298.
Isaacson *v.* R. Co., 115, 150, 288.
Isabella, The, 154, 166.
Ismaele, The, 182.
Israel *v.* Clark, 231, 232.
Ives *v.* Hartley, 20.
Ivory *v.* Hedges, 230.
Izett *v.* Mountain, 142.

J.

Jackman *v.* Partridge, 29.
Jacques *v.* R. Co., 347.
Jackson *v.* Cummings, 27.
Jackson *v.* Ins. Co., 118.
Jackson *v.* R. Co., 202, 297, 298, 328, 341.
Jackson *v.* Robinson, 42.
Jacksonville &c. R. Co. *v.* Chappell, 269.
Jacob *v.* R. Co., 308.
Jacobs *v.* Tutt, 278, 286.
Jacobus *v.* R. Co., 137, 248, 304.
Jalie *v.* Cardinal, 74, 80.
James' Appeal, 53.
Jamison *v.* R. Co., 234.
Janney *v.* Sleeper, 211.
Jarvis *v.* Rogers, 52, 53, 54.
Jeane's Appeal, 62, 64, 66.
Jefferson &c. R. Co. *v.* Logan, 341.
Jeffersonville &c. R. Co. *v.* Cleveland, 202.
Jeffersonville &c. R. Co. *v.* Cotton, 202.
Jeffersonville R. Co. *v.* Hendricks, 231, 253, 308, 341.
Jeffersonville &c. R. Co. *v.* Parmalee, 253.
Jeffersonville &c. R. Co. *v.* Riley, 228, 234, 252.
Jeffersonville &c. R. Co. *v.* Rogers, 257, 261, 298, 348.
Jeffersonville R. Co. *v.* White, 22.
Jeffords *v.* Crump, 72.
Jenkins *v.* Bacon, 10, 20, 22, 29.
Jenkins *v.* Eichelberger, 26.
Jenkins *v.* Motlow, 10, 33, 83.
Jenkins *v.* R. Co., 225.
Jencks *v.* Coleman, 84, 217, 219, 222, 223, 264.
Jennings *v.* R. Co., 100, 109, 157, 162.
Jerome *v.* McCarter, 52.
Jerome *v.* Smith, 244, 262.
Jesup *v.* City Bank, 53.
Jewett *v.* R. Co., 300, 308.
Jewett *v.* Warren, 51, 55.
John *v.* Bacon, 293.
Johnson *v.* Baker, 8.
Johnson *v.* Dodgson, 211.
Johnson *v.* Friar, 83, 166.
Johnson *v.* Hill, 82, 215.
Johnson *v.* Holyoke, 15.
Johnson *v.* Hudson, 341.
Johnson *v.* New York Cent. R. Co., 127.
Johnson *v.* R. Co., 92, 205, 231, 241, 242, 244, 269, 291, 297, 308, 309, 315, 341.
Johnson *v.* Richardson, 76, 80.
Johnson *v.* Reynolds, 33, 72.
Johnson *v.* Stear, 66, 69.
Johnson *v.* Stone, 272.
Johnson *v.* Tel. Co., 320.
Johnson *v.* Vernon, 62.
Johnson *v.* Wells, 347.
Johnson *v.* Wiley, 17.
Jones, re, 72.
Jones *v.* Baldwin, 70.
Jones *v.* Boyce, 308.
Jones *v.* Bright, 232.
Jones *v.* Gilmore, 40.
Jones *v.* Hatchett, 13, 47.
Jones *v.* Hawkins, 58.
Jones *v.* McNeil, 15.
Jones *v.* Morgan, 7, 40.
Jones *v.* Page, 24.
Jones *v.* Pearle, 26.
Jones *v.* Pitcher, 12, 84, 166.
Jones *v.* R. Co., 84, 225, 245, 262, 345.
Jones *v.* Scott, 59.
Jones *v.* The Cortez, 347.
Jones *v.* Trans. Co., 286.
Jones *v.* Tyler, 77.
Jones *v.* Walker, 338.
Jones *v.* Voorhees, 84, 140, 272.
Joliet Iron Co. *v.* Scioto Fire Brick Co., 66.
Jordan *v.* Buchanan, 83.
Jordan *v.* James, 26.
Jordan *v.* Hutchinson, 83.
Jordan *v.* R. Co., 270, 272, 281, 284.
Joseph &c. R. Co. *v.* Wheeler, 266.
Joslin *v.* Gd. Rapids Co., 301.
Joslyn *v.* King, 33.
Jourdan *v.* Reed, 33.
Judson *v.* Etheridge, 27.
Judson *v.* R. Co., 109, 112, 137, 142, 143.
Julian *v.* Tel. Co., 317.
June *v.* R. Co., 227.
Juniata Paton, The, 166, 338.

K.

Kain *v.* Smith, 295.
Kaiser *v.* Hoey, 158.
Kallman *v.* U. S. Ex. Co., 137, 142, 338.
Kansas City Trans. Co. *v.* Neiswanger, 104.
Kansas &c. R. Co. *v.* Fitzsimmons, 301.
Kansas &c. R. Co. *v.* Kessler, 266, 268.
Kansas &c. R. Co. *v.* Montelle, 285, 288.

The References are to Sections.

Kansas &c. R. Co. *v.* Morrison, 272.
Kansas &c. R. Co. *v.* Nicholls, 86, 137.
Kansas &c. R. Co. *v.* Phillibert, 341.
Kansas &c. R. Co. *v.* Perkins, 130.
Kansas &c. R. Co. *v.* Pointer, 341.
Kansas &c. R. Co. *v.* Reynolds, 86, 137, 154, 157, 338.
Kansas &c. R. Co. *v.* Rodenbaugh, 240.
Kansas &c. R. Co. *v.* Salmon, 226.
Kansas &c. R. Co. *v.* Simpson, 142.
Kansas &c. R. Co. *v.* White, 304.
Karle *v.* R. Co., 304.
Kaut *v.* Kessler, 44.
Kay *v.* R. Co., 230.
Kay *v.* Wheeler, 166.
Keating *v.* R. Co., 234.
Keegan *v.* R. Co., 301.
Keeley *v.* R. Co., 241, 242.
Keenan *v.* Southworth, 330.
Keene *v.* Lizardi, 298.
Keeney *v.* R. Co., 91, 139.
Keith *v.* Amende, 170.
Keith *v.* Bliss, 43.
Keith *v.* Pinkham, 231, 304.
Kelham *v.* The Kensington, 338.
Kellar *v.* Garth, 20.
Kellar *v.* Rhoads, 31.
Keller *v.* R. Co., 234, 253.
Kellett *v.* R. Co., 241.
Kellogg *v.* Payne, 301.
Kellogg *v.* Sweeney, 10, 73, 79.
Kelly, re, 27.
Kelly *v.* Patchell, 23.
Kelly *v.* R. Co., 92.
Kelsey *v.* Berry, 80.
Kelton *v.* Taylor, 43.
Kember *v.* Ex. Co., 149, 155, 160.
Kemble *v.* Lull, 160.
Kemp *v.* Coughtry, 95, 214.
Kemp *v.* Farlow, 33.
Kemp *v.* Westbrook, 57, 60, 69.
Kendall *v.* London R. Co., 86.
Kendall *v.* Stokes, 330.
Kennard *v.* Burton, 341.
Kennard *v.* Willmore, 330.
Kennedy *v.* Ashcroft, 16, 21.
Kennedy *v.* R. Co., 201, 295.
Kennedy *v.* Rosier, 58.
Kennedy Cent. R. Co. *v.* Thomas, 220.
Kenney *v.* R. Co., 247.
Kent *v.* R. Co., 101, 104, 240, 291, 292, 345.
Kent *v.* Shuckard, 79.
Kenrig *v.* Eggelston, 133.
Kentucky *v.* R Co., 312.
Kentucky &c. Bridge Co. *v.* R. Co., 290.
Kentucky &c. R. Co. *v.* Dills, 308.
Kentucky &c. R. Co. *v.* Thomas, 304, 341.
Keokuk &c. Packet Co. *v.* True, 228.
Keokuk, The, 166, 338.
Kepperly *v.* Ramsden, 341.
Ker *v.* Mountain, 219, 250.
Kern *v.* De Castro Co., 328.
Kerr, re, 52, 55.
Kerr *v.* Liverpool &c. Nav. Co., 240.
Kerr *v.* R. Co., 289.
Kerr *v.* The Norman, 334.
Kerr *v.* Willan, 136, 143, 144.
Kerrigan *v.* R. Co., 290.
Kessler *v.* R. Co., 288.
Ketchum *v.* Am. Ex. Co., 137, 138.
Kettle *v.* Bromsall, 13.
Keyes *v.* Howe, 15.
Kibbe's Estate, 71.
Kiff *v.* R. Co., 108, 131, 162.
Kiley *v.* Tel. Co., 320.
Killian *v.* Hoffman, 63.
Killmer *v.* R. Co., 213.
Kimball *v.* Cushman, 300.
Kimball *v.* Hildredth, 70.
Kimball *v.* R. Co., 84, 86, 137.
King *v.* Bates, 8, 29.
King *v.* Green, 70.
King *v.* Indian Orchard Canal Co., 26.
King *v.* R. Co., 267, 301, 302.
King *v.* Richards, 19, 82, 209, 215.
King *v.* Shepherd, 84, 123, 124, 166, 338.
King *v.* Texas Banking Co., 66.
King *v.* Thompson, 347.
King *v.* Woodbridge, 152.
Kinghorne *v.* Tel. Co., 349.
Kinchelor *v.* Priest, 31.
Kinney *v.* R. Co., 248.
Kinnick *v.* R. Co., 86.
Kinsley *v.* R. Co., 289, 293.
Kirby *v.* Adams Ex. Co., 137, 157.
Kirby *v.* R. Co., 138.
Kirk *v.* Folsom, 338.
Kirk *v.* R. Co., 202.
Kirkland *v.* Dinsmore, 147, 149, 160,
Kirkland *v.* Montgomery, 10.
Kirtland *v.* Montgomery, 31, 84, 95, 213.
Kissam *v.* Jones, 24.
Kisten *v.* Hilderbrand, 72, 76.
Kitchell *v.* Vanadar, 17, 214.
Kittera's Es., 61.
Klauber *v.* Am. Ex. Co., 96, 120, 125, 134.
Kleiber *v.* R. Co., 308.
Klein *v.* Jewett, 234, 347.
Kline *v.* R. Co., 257, 297, 298.
Klutts *v.* R. Co., 347.
Knapp *v.* Curtis, 40, 47.
Knell *v.* U. S. Steam Co., 139, 162.
Knight *v.* R. Co., 107, 231, 234, 288, 291, 308.
Knoll *v.* U. S. &c. S. S. Co., 175.
Knott *v.* R. Co., 101, 107.
Knox *v.* Rives, 95.
Knowles *v.* Dabney, 200.
Knowles *v.* R. Co., 14, 33, 201.
Knowlton *v.* R. Co., 137, 247.
Koenigsheen *v.* Hamburg &c. Packett Co., 162.
Koetter *v.* R. Co., 299.
Kohler *v.* Hayes, 8.
Kohn *v.* Packard, 201.
Koons *v.* Tel. Co., 322.
Kopper *v.* Willis, 72, 74.
Korah *v.* Ottawa, 297.
Kowing *v.* Manley, 20, 22, 29.
Kremer *v.* Ex. Co., 201.

The References are to Sections.

Krender *v.* Wolcott, 84.
Kresanowski *v.* R. Co., 306.
Krohn *v.* Sweeney, 72, 81.
Krulder *v.* Ellison, 211.
Kuter *v.* R. Co., 95, 275.
Kyle *v.* R. Co., 100, 103.

L.

La Barem *v.* R. Co., 232.
La Borde *v.* Ingraham, 33.
Lackawanna R. Co. *v.* Chenwith, 115, 225.
Lacombe *v.* Forstall, 63.
Lacoste *v.* Pipkin, 15.
Ladd *v.* R. Co., 232.
Lady Pike, The, 166, 338.
Lafayette &c. R. Co. *v.* Miles, 312.
Lafayette &c. R. Co. *v.* Sims, 306.
Lafitte *v.* R. Co., 298.
Lafourche Nav. Co. *v.* Collins, 31.
Lagrange *v.* Tel. Co., 319.
Lain *v.* Gaither, 19.
Laing *v.* Colder, 139, 271, 307, 340.
Laird *v.* Eichold, 76, 333.
Lake *v.* Hurd, 148.
Lake Erie &c. R. Co. *v.* Acres, 218.
Lake Erie &c. R. Co. *v.* Fix, 244.
Lake Erie &c. R. Co. *v.* Fox, 347.
Lake Erie &c. R. Co. *v.* Oakes, 111.
Lake Shore &c. R. Co. *v.* Bernett, 204.
Lake Shore &c. R. Co. *v.* Davis, 149.
Lake Shore &c. R. Co. *v.* Foster, 227, 281, 282, 284.
Lake Shore &c. R. Co. *v.* Greenwood, 143, 266, 268.
Lake Shore R. Co. *v.* Miller, 341.
Lake Shore R. Co. *v.* Perkins, 86, 95, 130, 161.
Lake Shore &c. R. Co. *v.* Prentice, 348.
Lake Shore &c. R. Co. *v.* Rosenwig, 225, 257, 265.
Lake Shore R. Co. *v.* Salzman, 269.
Lakin *v.* R. Co., 252, 296, 298, 300.
Lamare *v.* London &c. Docks Co., 47.
Lamb *v.* Parkman, 338.
Lamb *v.* R. Co., 40, 101, 107, 108, 109, 139, 156, 162, 200, 332, 338.
Lambertson *v.* Wisdom, 58.
Lambeth *v.* R. Co., 312.
Lamburger *v.* Westcott, 150.
Lamont *v.* Nashville &c. R. Co., 120.
Lamphaer *v.* Buckingham, 295.
Lampley *v.* Scott, 33.
Lancaster Co. Bank *v.* Smith, 13, 20, 30, 33.
Lancaster &c. R. Co. *v.* Rhoads, 301.
Landsberg *v.* Dinsmore, 339.
Landsberger *v.* Tel. Co., 349.
Landreaux *v.* Bell, 298.
Landrigan *v.* State, 264.
Lane *v.* Atlantic Works, 341.
Lane *v.* Cameron, 16, 21.
Lane *v.* Chadwick, 185.
Lane *v.* Cotton, 330.
Lane *v.* Crombie, 341.
Lane *v.* R. Co., 261, 268.
Lane *v.* Tel. Co., 349.
Langdon *v.* Buel, 51.
Langworthy *v.* R. Co., 215.
Lanier *v.* Youngblood, 80, 81.
Lape *v.* R. Co., 137.
Larimore *v.* R. Co., 230.
Lary *v.* R. Co., 230.
Latch *v.* R. Co., 340.
Latham *v.* Chartered Bank, 52.
Laugher *v.* Painter, 103, 301.
Laughlin *v.* R. Co., 111.
Laurent *v.* Vaughn, 345.
Laurie *v.* Douglas, 166.
Laveroni *v.* Drury, 84, 125, 166.
Law *v.* Botsford, 115.
Law *v.* Hatcher, 211.
Law *v.* R. Co., 257, 266.
Lawrence *v.* Calmont, 32.
Lawrence *v.* Green, 308.
Lawrence *v.* Howard, 72, 78.
Lawrence *v.* Maxwell, 61, 70.
Lawrence *v.* McCalmont, 58.
Lawrence *v.* McGregor, 127, 148.
Lawrence *v.* Minturn, 135, 166.
Lawrence *v.* R. Co., 104, 137, 142, 148. 336, 338.
Lawrenceburg R. Co. *v.* Montgomery, 306.
Lawson *v.* Merrall, 329.
Lawson *v.* R. Co., 137, 247.
Lay *v.* Lawson, 22.
Lazier *v.* Nevin, 58.
Leach *v.* French, 24, 25.
Leame *v.* Bray, 12.
Leary *v.* U. S., 168.
Leavenworth &c. R. Co. *v.* Maris, 201, 202.
Le Baron *v.* Joslin, 341.
Le Barron *v.* East Boston Ferry, 234, 235, 340.
Leber *v.* R. Co., 301.
Lebeau *v.* Gen. Steam. Nav. Co., 182.
Lechtenhein *v.* R. Co., 12.
Lecky *v.* McDermott, 26.
Le Conteur *v.* R. Co., 289.
Ledyard *v.* Hibbard, 8.
Lee *v.* Baldwin, 13.
Lee *v.* Marsh, 139.
Lee *v.* R. Co., 137.
Lee *v.* Troy Gas Co., 341.
Leeson *v.* Holt, 136.
Leigh *v.* Smith, 113, 116.
Lemke *v.* R. Co., 202.
Lemon *v.* Chansler, 84, 246, 340.
Lemont *v.* R. Co., 267.
Leo *v.* R. Co., 111.
Leonard *v.* Dunton, 344.
Leonard *v.* Hendrickson, 85.
Leonard *v.* Tel. Co., 317, 321, 349.
Le Sage *v.* R. Co., 127.
Lesan *v.* R. Co., 341.
Lesinsky *v.* Gt. West. Dispatch. Co., 102.
Lethbridge *v.* Phillips, 33.
Leuw *v.* Dudgeon, 162.
Levering *v.* Union Trans. &c. Co., 137, 140, 162, 338.
Levy *v.* Bergeron, 33.
Levy *v.* Loeb, 69.

The References are to Sections.

Levy *v.* R. Co., 84, 162.
Levy *v.* South. Ex. Co., 108, 109, 139.
Lewis *v.* Carsow, 15.
Lewis *v.* Graham, 62, 66.
Lewis *v.* Hitchcock, 72.
Lewis *v.* Ludwick, 121, 123, 129.
Lewis *v.* McAfee, 21.
Lewis *v.* Mott, 62, 69.
Lewis *v.* R. Co., 104, 110, 254, 325, 347.
Lewis *v.* Sleeping Car Co., 328.
Lewis *v.* The Success, 166, 345.
Lewis *v.* Varnum, 62.
Lichtenhein *v.* R. Co., 22.
Liddle *v.* R. Co., 296.
Lilley *v.* Doubleday, 20.
Lillis *v.* R. Co., 242, 257, 260.
Limburger *v.* Westcott, 139.
Limpus *v.* London Gen. Om. Co., 297.
Lindley *v.* R. Co., 345.
Lindsay *v.* Griffin, 297.
Lindsley *v.* R. Co., 86, 338.
Line *v.* Mills, 20.
Linfield *v.* R. Co., 295, 296.
Linnehan *v.* Rollins, 301.
Lion, The, 225.
Liscomb *v.* R. Co., 234.
Litchburne *v.* White, 133.
Little *v.* Barker, 57.
Little *v.* Dusenbery, 291, 295.
Little *v.* Fargo, 204.
Little *v.* Fassett, 15.
Little *v.* Hackett, 300, 315.
Little *v.* R. Co., 137, 146.
Little *v.* Semple, 100, 176.
Littlejohn *v.* Jones, 84, 98.
Littlejohn *v.* R. Co., 225.
Little Miami R. Co. *v.* Wetmore, 298.
Little Rock R. Co. *v.* Corcoran, 338.
Little Rock &c. R. Co. *v.* Cravens, 153.
Little Rock &c. R. Co. *v.* Daniels, 102.
Little Rock &c. R. Co. *v.* Davis, 342, 349.
Little Rock &c. R. Co. *v.* Dean, 241, 244.
Little Rock &c. Ry. Co. *v.* Glidewell, 84, 107, 206.
Little Rock &c. R. Co. *v.* Harper, 162, 330.
Little Rock &c. R. Co. *v.* Hunter, 112.
Little Rock &c. R. Co. *v.* Miles, 247, 306.
Little Rock &c. R. Co. *v.* R. Co., 290.
Little Rock &c. R. Co. *v.* Talbot, 137, 162, 169, 335, 338.
Liver, Alkali Co. *v.* Johnson, 84.
Liverpool &c. Steam Co. *v.* Phoenix Co., 136, 137, 166.
Live Yankee, The, 337.
Lloyd *v.* General Iron Screw &c. Co., 166.
Lloyd *v.* R. Co., 341.
Loyd *v.* West Branch Bank, 5, 33.
Lobdell *v.* Merchants Bank, 58.
Lobenstein *v.* Pritchett, 31, 33.
Lock *v.* R. Co., 106.
Lockhart *v.* Lichtenthaler, 225, 315.
Lockwood *v.* Ewer, 62.
Logan *v.* Mathews, 332.
Logan *v.* Mobile Trade Co., 148.
Logan *v.* R. Co., 137, 240, 268, 280, 281, 296.
Logan *v.* Tel. Co., 350.
Logwood *v.* R. Co., 265.
London &c. R. Co. *v.* Bartlett, 205.
London &c. R. Co. *v.* Dunham, 136.
London &c. R. Co. *v.* Watson, 261.
Long *v.* Horne, 250.
Long *v.* R. Co., 148, 160, 298.
Loomis *v.* Pearson, 125.
Loomis *v.* R. Co., 103.
Loomis *v.* Stave, 52.
Look *v.* Comstock, 70.
Longman *v.* Caleni, 42.
Long Island Brewery Co. *v.* Fitzpatrick, 22.
Loper *v.* Tel. Co., 350.
Lord *v.* Jones, 27.
Loring *v.* Aborn, 262.
Lotsperch *v.* R. Co., 101.
Loughbrough *v.* McNevin, 61.
Louisiana State Bk. *v.* Gareunie, 52.
Louisville &c. Canal Co. *v.* Murphy, 341.
Louisville &c. R. Co. *v.* Ballard, 298.
Louisville &c. R. Co. *v.* Brownlee, 137, 138, 140, 148.
Louisville &c. R. Co. *v.* Campbell, 102, 104, 106.
Louisville &c. R. Co. *v.* Case, 315.
Louisville &c. R. Co. *v.* Flanagan, 95.
Louisville &c. R. Co. *v.* Fleming, 244, 262, 304.
Louisville &c. R. Co. *v.* Garrett, 256.
Louisville &c. R. Co. *v.* Gilbert, 153, 157.
Louisville &c. R. Co. *v.* Goetz, 341.
Louisville &c. R. Co. *v.* Harris, 263.
Louisville &c. R. Co. *v.* Head, 341.
Louisville &c. R. Co. *v.* Hedger, 86, 137, 140, 336.
Louisville &c. R. Co. *v.* Katzenberger, 328.
Louisville &c. R. Co. *v.* Kelly, 312.
Louisville &c. R. Co. *v.* Lockridge, 341.
Louisville &c. R. Co. *v.* Mahan, 286, 287.
Louisville &c. R. Co. *v.* Mask, 253.
Louisville &c. R. Co. *v.* Maybin, 267.
Louisville &c. R. Co. *v.* Meyer, 106, 137, 156.
Louisville &c. R. Co. *v.* McEwan, 302
Louisville &c. R. Co. *v.* McGuire, 202.
Louisville &c. R. Co. *v.* Oden, 137, 142, 159, 162.
Louisville &c. R. Co. *v.* Orr, 341.
Louisville &c. R. Co. *v.* Pedigo, 233.
Louisville &c. R. Co. *v.* Sherrod, 142.
Louisville &c. R. Co. *v.* Sickings, 307.
Louisville &c. R. Co. *v.* State, 265.
Louisville &c. R. Co. *v.* Weaver, 106. 292.

The References are to Sections.

Louisville &c. R. Co. *v.* Whitman, 257, 348.
Louisville &c. R. Co. *v.* Wilson, 160.
Louisville &c. R. Co. *v.* Wolfe, 234.
Louisville Trans. Co. *v.* Am. Dist. Teleph. Co., 323.
Loveland *v.* Burke, 135.
Lovering *v.* Buck Mt. Coal Co., 120.
Lovering *v.* Union &c. Trans. Co., 334.
Lovett *v.* Hobbs, 97, 217.
Lovett *v.* R. Co., 312.
Low *v.* Martin, 27.
Lowe *v.* Booth, 125, 136.
Lowe *v.* Woods, 26.
Lowell *v.* R. Co., 301.
Lowell Wire Fence Co. *v.* Sargent, 84
Lowenburg *v.* Jones, 110.
Lowery *v.* Tel. Co., 349.
Lowremore *v.* Berry, 209.
Loyd *v.* R. Co., 308.
Lucas *v.* R. Co., 225, 230, 266, 308.
Lucas *v.* Trumbull, 16, 21.
Lucesco Oil Co. *v.* R. Co., 139.
Lucketts *v.* Townsend, 51, 57, 60, 62.
Luckey *v.* Gannon, 52.
Ludden *v.* Leavitt, 15.
Ludlow *v.* Browne, 211.
Luna *v.* Dwinelle, 74.
Lundy *v.* R. Co., 242.
Lunt *v.* Brown, 15.
Lusk *v.* Belote, 74.
Lydian Monarch, The, 142, 337.
Lygo *v.* Newbold, 340.
Lyle *v.* Barker, 68.
Lynar *v.* Mossop, 74.
Lynch *v.* Knight, 350.
Lynch *v.* R. Co., 259, 298.
Lynn *v.* R. Co., 309.
Lyon *v.* Hill, 208.
Lyon *v.* Mells, 125.
Lyon *v.* Smith, 72.
Lyons *v.* Martin, 76.
Lyons *v.* R. Co., 347.

M.

Macdougall *v.* R. Co., 341.
Mackey *v.* Tel. Co., 349.
Macklin *v.* Frazier, 40, 47.
Macklin *v.* New Jersey Steam. Co., 139, 143, 159, 271, 272, 289.
Macomber *v.* Parker, 51, 57, 70.
Macon &c. R. Co. *v.* Johnson, 306.
Macrow *v.* R. Co., 272.
Madan *v.* Covert, 40, 47.
Madan *v.* Sherard, 139, 150, 154.
Mad River R. Co. *v.* Fuller, 272.
Maddox *v.* Brown, 297.
Magee *v.* Scott, 15, 29.
Maggie Hammond, The, 84, 120, 128.
Maghee *v.* R. Co., 101, 108, 127, 148, 183, 186, 205.
Magnan *v.* R. Co., 314.
Magnin *v.* Dinsmore, 133, 139, 142, 149, 162, 338.
Magoffin *v.* R. Co., 225.
Maguire *v.* R. Co., 269, 306.
Maheim *v.* Carr, 201.
Maher *v.* R. Co., 347.
Mahon *v.* The Olive Branch, 166, 337.
Mahoney *v.* R. Co., 296.
Maignan *v.* R. Co., 202.
Mairs *v.* Taylor, 54.
Majestic, The, 136, 137, 141, 240.
Maloney *v.* Taft, 21.
Malecek *v.* R. Co., 298, 348.
Mallory *v.* Griffey, 341.
Mallory *v.* Willis, 8.
Mallory *v.* R. Co., 84.
Malone *v.* R. Co., 137, 143, 240.
Malone *v.* Robinson, 21.
Maloney *v.* Spencer, 77.
Malpas *v.* R. Co., 160.
Maltby *v.* Chapman, 79, 81.
Mangalore, The, 337, 345.
Mange *v.* Heringhi, 62.
Manhasset, The, 307.
Manhattan Oil Co. *v.* R. Co., 108.
Manier *v.* Tel. Co., 319.
Manley *v.* R. Co., 341.
Mann *v.* Birchard, 137, 146.
Mann *v.* White River &c. Co., 85.
Manney *v.* Ingram, 27.
Manning *v.* Hollenbeck, 26, 82.
Manning *v.* McClure, 54.
Manning *v.* Wells, 72, 74, 76.
Manville *v.* Tel. Co., 319, 320, 349.
Maples *v.* R. Co., 257, 262.
Marine Ins. Co. *v.* R. Co., 204.
Mariner *v.* Smith, 31, 33.
Marion St. R. Co. *v.* Shaffer, 306.
Markel *v.* Tel. Co., 318.
Markham *v.* Brown, 73, 264.
Markham *v.* Jaudon, 52, 62.
Marner *v.* Banks, 17.
Maroney *v.* R. Co., 244, 268.
Marquette *v.* R. Co., 265, 297.
Marquette &c. R. Co. *v.* Kirkwood, 111.
Marr *v.* Tel. Co., 320, 349.
Marschuetz *v.* Wright, 58.
Marsh *v.* Blythe, 166, 337.
Marsh *v.* Titus, 8.
Marshall *v.* Am. Ex. Co., 200, 201.
Martha *v.* Olcott, 160.
Martha, The, 170.
Martin *v.* Am. Ex. Co., 101, 109.
Martin *v.* Cuthbertson, 21.
Martin *v.* Pope, 27.
Martin *v.* Reed, 62.
Martin *v.* R. Co., 162, 234.
Martin *v.* Somerville Co., 64.
Marx *v.* Nat. S. S. Co., 162.
Marx *v.* The Britannia, 338.
Maryland Ins. Co. *v.* Dalrymple, 62, 64.
Maryland Ins. Co. *v.* Le Roy, 127.
Maskos *v.* Am. S. S. Co., 100.
Maslin *v.* R. Co., 137, 247.
Mason *v.* Briggs, 22.
Mason *v.* R. Co., 86.
Mason *v.* Thompson, 76, 82, 327.
Massengale *v.* Tel. Co., 320.
Masters *v.* Warren, 347.
Masterson *v.* Mayer, 344.
Masterson *v.* R. Co., 308.
Mateer *v.* Brown, 72, 76.
Mather *v.* Am. Ex. Co., 142, 345.

The References are to Sections.

Mathews *v.* Sellars, 26.
Mathias *v.* Sellars, 27.
Mathis *v.* Tel. Co., 319.
Matthiessen &c. Co. *v.* Gusi, 182.
Mattison *v.* R. Co., 287, 347.
Mauritz *v.* R. Co., 240.
Maury *v.* Coyle, 33, 58.
Maury *v.* Talmadge, 231.
Maving *v.* Todd, 136.
Maxwell *v.* Eason, 12.
Maxwell *v.* Houston, 19, 22.
Maxwell *v.* McIlvoy, 330.
May *v.* Babcock, 148.
May *v.* Hanson, 84, 341.
May *v.* Harvey, 28.
May *v.* The Powhattan, 137.
Maybin *v.* R. Co., 89, 112.
May *v.* Sharp, 58.
Maynard *v.* Buck, 45.
May Queen, The, 137, 140, 142.
Mayo *v.* Avery, 61.
Mayo *v.* Mayo, 58.
Mayo *v.* R. Co., 341.
Mayor *v.* Howard, 21.
Mayor *v.* McCary, 301.
McAlister *v.* R. Co., 131, 190.
McAllen *v.* Tel. Co., 350.
McAndrew *v.* Tel. Co., 317.
McAndrew *v.* Whitlock, 201.
McArthur *v.* Sears, 84, 124, 166.
McBeath *v.* R. Co., 135, 158.
McCafferty *v.* R. Co., 301.
McCall *v.* Brock, 122.
McCall *v.* Chamberlain, 295.
McCalla *v.* Clark, 60, 61.
McCann *v.* Eddy, 107.
McCaw *v.* Kimbrel, 43.
McCarthy *v.* R. Co., 47, 103, 107, 202.
McCarthy *v.* Portland, 301.
McCarthy *v.* Wolfe, 45.
McCarthy *v.* Young, 24.
McCaulay *v.* Davidson, 10, 33.
McClary *v.* R. Co., 126, 231, 340.
McClenaghan *v.* Brock, 121.
McClure *v.* Cox, 166.
McClure *v.* R. Co., 142, 241, 244, 445.
McClure *v.* Richardson, 83.
McClures *v.* Hammond, 83, 84.
McColl *v.* Tel. Co., 349.
McCollum *v.* Porter, 40.
McConihe *v.* R. Co., 25.
McConnell *v.* Maxwell, 15.
McConnell *v.* R. Co., 101.
McCord *v.* Tel. Co., 317.
McCormack *v.* R. Co., 272, 288.
McCoy *v.* McKowan, 297.
McCoy *v.* R. Co., 86, 137.
McCoy *v.* Trans. Co., 137, 140, 148, 193.
McCullom *v.* Porter, 47.
McCullough *v.* McDonald, 206.
McDaniel *v.* R. Co., 137.
McDaniels *v.* Flower Brook Manfg. Co., 56.
McDaniels *v.* Robinson, 74, 76, 78, 82, 332, 333.
McDonald *v.* Bennett, 27.
McDonald *v.* Edgerton, 76, 77.
McDonald *v.* R. Co., 104, 202, 234, 297, 313, 347.
McDonough *v.* R. Co., 227, 308.
McDougal *v.* Allen, 272.
McDowell *v.* Chicago Steel Works, 62 64.
McDuffee *v.* R. Co., 89, 91, 95.
McElroy *v.* R. Co., 231, 233, 293, 294.
McElwain *v.* R. Co., 335.
McEntee *v.* Steam. Co., 206, 209.
McEvers *v.* The Sangamon, 13, 42.
McEwan *v.* R. Co., 205, 206.
McFadden *v.* R. Co., 137, 142, 148, 153, 157, 160.
McFarland *v.* Smith, 15.
McFarland *v.* Wheeler, 27, 215.
McGaw *v.* Ocean Ins. Co., 213.
McGee *v.* Bast, 10.
McGee *v.* R. Co., 266.
McGill *v.* Monette, 15.
McGill *v.* Rowand, 270, 272.
McGinn *v.* Butler, 22.
McGinniss *v.* R. Co., 244, 298, 299.
McGinney *v.* R. Co., 269.
McGloin *v.* Henderson, 250.
McGraw *v.* R. Co., 126.
McGregor *v.* Kilgore, 84, 176, 345.
McGuire *v.* Grant, 300, 301.
McHenry *v.* R. Co., 123.
McIntyre *v.* Carver, 26.
McIntyre *v.* R. Co., 251, 312.
McKay *v.* Hamblin, 33.
McKay *v.* R. Co., 162, 244.
McKee *v.* Owen, 271, 289.
McKenzie *v.* McLeod, 297.
McKeon *v.* R. Co., 298.
McKern *v.* R. Co., 225.
McKibben *v.* Bakers, 12.
McKibbin *v.* Peck, 213.
McKimble *v.* R. Co., 227.
McKinley *v.* R. Co., 298, 347.
McKinney *v.* Jewett, 202.
McKinney *v.* Neil, 231, 308, 340.
McKinnon *v.* McEwan, 344.
McKone *v.* R. Co., 230, 234.
McLain *v.* Lloyd, 45.
McLain *v.* Hoffman, 29.
McLaughlin *v.* Corry, 347.
McLaughlin *v.* R. Co., 308.
McLaughlin *v.* Waite, 15.
McLean *v.* Burbank, 293, 340.
McLean *v.* Walker, 51, 52, 61, 62.
McMahon *v.* R. Co., 244.
McManus *v.* Crickett, 297.
McManus *v.* R. Co., 86, 139.
McMillan *v.* R. Co., 107, 137, 142, 146, 147, 148, 157, 201, 202, 335.
McNabb *v.* Lockhart, 33.
McNeil *v.* Brooks, 21, 42.
McNeil *v.* Tenth Nat. Bk., 57.
McPadden *v.* R. Co., 231, 232, 233.
McQuade *v.* R. Co., 227.
McQueen *v.* R. Co., 226.
McQuillan *v.* R. Co., 341.
McRae *v.* R. Co., 268.
MacVeagh *v.* R. Co., 131.
McVeety *v.* R. Co., 225.
Mead *v.* Bunn, 5.
Meany *v.* Head, 26.
Meara *v.* Holland, 295.
Mechanics' Bank *v.* Gordon, 33.
Medbury *v.* R. Co., 345.

The References are to Sections.

Medlin *v.* Wilkerson, 17.
Meesel *v.* R. Co., 306, 307.
Mehrbach *v.* Liverpool &c. Co., 152, 156.
Meier *v.* R. Co., 231, 232, 235, 340.
Mein *v.* West, 33.
Mellor *v.* R. Co., 225.
Memphis &c. R. Co. *v.* Benson, 251, 265.
Memphis &c. R. Co. *v.* Chastine, 225.
Memphis &c. R. Co., *v.* Hoechner, 295.
Memphis &c. R. Co. *v.* Holloway, 111, 158.
Memphis &c. R. Co. *v.* Jones, 162.
Memphis &c. R. Co. *v.* McCool, 340.
Memphis &c. R. Co. *v.* South. Ex. Co., 95.
Memphis &c. R. Co. *v.* Stringfellow, 254, 295.
Memphis &c. R. Co. *v.* Whitfield, 234, 253, 347.
Menacho *v.* Ward, 89, 90, 92.
Mener *v.* R. Co., 139, 190.
Mentzer *v.* Tel. Co., 318, 350, 351.
Menzell *v.* R. Co., 197.
Mercantile Ins. Co. *v.* Chase, 118, 138.
Merchants' Bank *v.* Livingston, 57.
Merchants' Bank *v.* Thompson, 62.
Merchants' Mut. Ins. Co. *v.* Chase, 139.
Merchants' Nat. Bk. *v.* Carhart, 332.
Merchants' Nat. Bk. *v.* Guilmartin, 33.
Merchants' Nat. Bk. *v.* Hall, 55.
Merchants' &c. Trans. Co. *v.* Bloch, 84, 100, 137, 148, 337.
Merchants' &c. Trans. Co. *v.* Bolles, 108, 109.
Merchants' &c. Trans. Co. *v.* Cornforth, 137, 156, 162.
Merch. &c. Trans. Co. *v.* Hallock, 207.
Merchants' &c. Trans. Co. *v.* Jaesting, 140, 148, 149.
Merchants' &c. Trans. Co. *v.* Kahn, 104, 127.
Merchants' &c. Trans. Co. *v.* Leysor, 140, 148, 149, 154.
Merchants' &c. Trans. Co. *v.* Merriam, 186, 206.
Merchants' &c. Trans. Co. *v.* Moore, 103.
Merchants' &c. Trans. Co. *v.* Story, 40.
Merchants' &c. Trans. Co. *v.* Theilbar, 137, 148.
Merchants' Wharfboat Assn. *v.* Wood, 48.
Meredith *v.* Meigh, 211.
Merriam *v.* R. Co., 113, 116.
Merrick *v.* Brainard, 212.
Merrick *v.* Certain Bushels of Wheat, 167.
Merrick *v.* Webster, 205.
Merrifield *v.* Baker, 52, 56, 61, 70.
Merrill *v.* Arey, 166.
Merrill *v.* Grinnell, 270, 271, 272.
Merrill *v.* Hampden, 341.
Merrill *v.* Houghton, 69.
Merrill, re, 230.
Merrill *v.* R. Co., 227.
Merrill *v.* Tel. Co., 349.
Merritt *v.* Claghorn, 76.
Merritt *v.* Earle, 123.
Merritt *v.* Johnson, 8.
Mershon *v.* Habensock, 83, 122, 123.
Merwin *v.* Butler, 95.
Messenger *v.* R. Co., 91, 92.
Metcalfe *v.* Hess, 76.
Metropolitan &c. R. Co. *v.* Moore, 225, 269.
Metz *v.* R. Co., 272, 295, 296.
Metzger *v.* Franklin Bk., 33.
Meyer *v.* Harnden's Ex. Co., 109, 139,
Meyer *v.* Jacobs, 26.
Meyer *v.* Lemeke, 185.
Meyer *v.* Peck, 167, 177.
Meyer *v.* R. Co., 202, 301, 340.
Meyerstein *v.* Barber, 51.
Michael *v.* Stanton, 300.
Michaels *v.* R. Co., 104, 110, 123, 124, 126.
Michigan &c. R. Co. *v.* Boyd, 156.
Michigan &c. R. Co. *v.* Burrows, 126.
Michigan &c. R. Co. *v.* Carrow, 5, 271, 272, 275, 278.
Mich. &c. R. Co. *v.* Carter, 345.
Mich. &c. R. Co. *v.* Day, 200, 204, 205.
Mich. &c. R. Co. *v.* Hale, 109, 137, 143, 154, 161.
Mich. &c. R. Co. *v.* Heaton, 137, 139, 162, 240.
Mich. &c. R. Co. *v.* Lantz, 341.
Mich. &c. R. Co. *v.* McDonough, 86, 91, 130.
Mich. &c. R. Co. *v.* Meyres, 288.
Mich. &c. R. Co. *v.* Myrick, 86.
Mich. &c. R. Co. *v.* Oehm, 271, 272.
Mich. &c. R. Co. *v.* Schutz, 112.
Mich. &c. R. Co. *v.* Ward, 137.
Middlesex Bank *v.* Minot, 63.
Middleton *v.* Hayward, 213.
Middleton *v.* Stone, 8.
Midland R. Co. *v.* Bromley, 332.
Mierson *v.* Hope, 209.
Miles *v.* Cattle, 302.
Miles *v.* Walther, 67.
Miletus, The, 166.
Milford *v.* Wesley, 81.
Millard *v.* R. Co., 278.
Miller *v.* Adsit, 15.
Miller *v.* Gettysburg Bank, 58.
Miller *v.* Marston, 26, 27.
Miller *v.* Nav. Co. 104.
Miller *v.* Peeples, 78.
Miller *v.* Pendleton, 84.
Miller *v.* R. Co., 182, 301, 307, 340.
Miller *v.* Steam Nav. Co., 122.
Milliken *v.* Dehon, 62.
Milliman *v.* R. Co., 269.
Millio *v.* Gettysburg Bank, 58.
Milman *v.* R. Co., 253.
Millon *v.* Salisbury, 42.
Mills *v.* Ashe, 16.
Mills *v.* R. Co., 104, 202.
Mills *v.* Stewart, 70.
Miltimore *v.* R. Co., 120.

The References are to Sections.

Milton *v.* Salisbury, 42.
Milwaukee &c. R. Co. *v.* Arms, 348.
Milwaukee &c. R. Co. *v.* Finney, 348.
Milwaukee &c. R. Co. *v.* Hunter, 341.
Milwaukee &c. R. Co. *v.* Smith, 106.
Milwaukee Belle, The, 166.
Mina *v.* I. & V. Florio S. S. Co., 176.
Minor *v.* R. Co., 31, 33.
Minor *v.* Staples, 77.
Minter *v.* R. Co., 115, 278, 284, 297, 270, 272.
Mississippi &c. R. Co. *v.* Kennedy, 270, 272.
Missouri Furnace Co. *v.* Abend, 341.
Missouri, The *v.* Webb, 170.
Missouri Pac. R. Co., see Mo. Pac. R. Co.
Mister *v.* R. Co., 300.
Mitchell *v.* Crassweller, 328.
Mitchell *v.* Ex. Co., 170, 338.
Mitchell *v.* Marker, 329.
Mitchell *v.* Roberts, 70.
Mitchell *v.* R. Co., 252, 254, 340, 341,
Mitchell *v.* Woods, 80.
Mobile &c. R. Co. *v.* Ashcraft, 347.
Mobile &c. R. Co. *v.* Copeland, 106.
Mobile &c. R. Co. *v.* Henshaw, 341.
Mobile &c. R. Co. *v.* Hopkins, 104, 123, 137, 142, 248, 271.
Mobile &c. R. Co. *v.* Jarboe, 137, 338.
Mobile &c. R. Co. *v.* Jurey, 154.
Mobile &c. R. Co. *v.* McArthur, 241, 253, 266.
Mobile &c. R. Co. *v.* McKean, 347.
Mobile &c. R. Co. *v.* Mayes, 294.
Mobile &c. R. Co. *v.* Prewett, 201. 202.
Mobile &c. R. Co. *v.* Weiner, 137, 140, 146.
Moffat *v.* VanDoren, 52.
Mohawk The, 122, 166, 213.
Mohr *v.* R. Co., 202.
Mollie Mohler, The, 166, 338.
Monjo *v.* French, 8.
Montana The, 137, 162, 166, 338.
Monteath *v.* Bissell, 33.
Montgomery *v.* Evans, 29.
Montgomery *v.* The Abbey Pratt, 170.
Montgomery Gaslight Co. *v.* R. Co., 15.
Montgomery &c. R. Co. *v.* Boring, 234, 347.
Montgomery &c. R. Co. *v.* Edmonds, 135, 162.
Montgomery &c. R. Co. *v.* Moore, 103.
Mooers *v.* Larry, 14, 42.
Moon *v.* R. Co., 297.
Moore *v.* Eva, 139.
Moore *v.* Evans, 162, 338.
Moore *v.* Henry, 103, 160.
Moore *v.* Hitchcock, 26, 27.
Moore *v.* Holland, 8.
Moore *v.* Lawrence, 344.
Moore *v.* Mayor, 40.
Moore *v.* R. Co., 122, 231, 297, 298, 341.
Moore *v.* Sanborne, 297, 301.
Moore *v.* Shreveport, 341.
Moore *v.* State, 5.
Moore *v.* The Evening Star, 271.
Moose *v.* Mayor, 47.
Mo. Pac. R. Co. *v.* Barnes, 199.
Mo. Pac. R. Co. *v.* Beeson, 156.
Mo. Pac. R. Co. *v.* Caldwell, 162.
Mo. Pac. R. Co. *v.* Carter, 140, 154, 157, 158, 159.
Mo. Pac. R. Co. *v.* Childress, 158.
Mo. Pac. R. Co. *v.* Cornwall, 158.
Mo. Pac. R. Co. *v.* Scott, 158.
Mo. Pac. R. Co. *v.* Fagan, 130, 158.
Mo. Pac. R. Co. *v.* Harris, 86, 137, 158.
Mo. Pac. R. Co. *v.* Holcomb, 266.
Mo. Pac. R. Co. *v.* Ivey, 247.
Mo. Pac. R. Co. *v.* McCally, 341.
Mo. Pac. R. Co. *v.* Nevill, 129.
Mo. Pac. R. Co. *v.* R. Co., 105.
Mo. Pac. R. Co. *v.* Russell, 302.
Mo. Pac. R. Co. *v.* Ryan, 103.
Mo. Pac. R. Co. *v.* Scott, 158.
Mo. Pac. &c. R. Co. *v.* Weaver, 347.
Mo. Pac. R. Co. *v.* Vandeventer, 137.
Mo. Pac. R. Co. *v.* Young, 103.
Morehead *v.* Brown, 47.
Morel *v.* Miss. Ins. Co., 307.
Mores *v.* Conham, 57.
Morgan *v.* Bridge Co., 341.
Morgan *v.* Congdon, 27.
Morgan *v.* Dibble, 125, 201.
Morgan *v.* Ravey, 76, 81.
Moriarty *v.* Brooks, 73.
Moriarty *v.* Harnden's Ex., 101, 109.
Morrissey *v.* Wiggins Ferry Co., 231.
Morley *v.* Attenborough, 66.
Morning Mail, The, 166.
Morris *v.* Fales, 53.
Morris *v.* Norris, 83.
Morris *v.* R. Co., 5, 302.
Morris. Canal Co. *v.* Fisher, 57.
Morris. Canal Co. *v.* Lewis, 52.
Morris. &c. R. Co. *v.* Ayres, 201, 202.
Morrison *v.* Davis, 126.
Morrison *v.* Construction Co., 147, 162.
Morrison *v.* General Steam Nav. Co., 12.
Morrison *v.* R. Co., 300, 308, 314.
Morrison *v.* Trans. Co., 137.
Morse *v.* Crawford, 29.
Morse *v.* R. Co., 103, 347.
Morse *v.* Slue, 84, 136.
Morss *v.* Stone, 5, 8.
Mosher *v.* R. Co., 244, 263.
Mosher *v.* South. Ex. Co., 106, 140.
Moses *v.* Norris, 121.
Moses *v.* R. Co., 89, 109, 112, 119, 137, 141, 142, 146, 202.
Moss *v.* Beattie, 83.
Moss *v.* Bettis, 83.
Mote *v.* R. Co., 287.
Mott *v.* Pettit, 5, 29.
Moulton *v.* Greene, 26.
Moulton *v.* Phillips, 47.
Moulton *v.* R. Co., 137, 142.
Mount Vernon *v.* Dusouchett, 341.
Mowers *v.* Fethers, 79.
Mowry *v.* Tel. Co., 349.
Moylan *v.* R. Co., 308.
Muddle *v.* Stride, 125.
Mudgett *v.* Steamb. Co., 289.
Muggridge *v.* Eveleth, 15.
Muelhausen *v.* R. Co., 225, 266.
Mueller *v.* R. Co., 148.

The References are to Sections.

Muldoon *v.* R. Co., 240, 248.
Muldowney *v.* R. Co., 304, 341, 347.
Mulhado *v.* R. Co., 253.
Mullen *v.* Morris, 58.
Muller *v.* Pondir, 51.
Mulligan *v.* R. Co., 101, 106, 137, 147, 148.
Multimore *v.* R. Co., 135.
Munn *v.* Baker, 136, 143, 154.
Munn *v.* People, 47.
Munn *v.* R. Co., 253.
Murch *v.* R. Co., 266, 293.
Murchison *v.* Sergent, 80, 81.
Murdoch *v.* R. Co., 244, 346, 347.
Murphy *v.* Deane, 341.
Murphy *v.* Hays, 329.
Murphy *v.* Kauffman, 21.
Murphy *v.* R. Co., 230, 257, 258, 265, 267, 302, 340, 341, 348.
Murray *v.* Burling, 16.
Murray *v.* Clarke, 78.
Murray *v.* Marshall, 78.
Murray *v.* Warner, 15, 185, 205.
Muschamp *v.* R. Co., 106.
Muser *v.* Holland, 142.
Muster *v.* R. Co., 302.
Myall *v.* R. Co., 115.
Myer *v.* Peck, 160.
Myers *v.* Baymore, 214.
Myers *v.* Cottrill, 73, 79.
Myers *v.* Perry, 12.
Myers *v.* R. Co., 159.
Myers *v.* Walker, 47.
Mylton *v.* R. Co., 291.
Mynard *v.* R. Co., 86, 139, 162.
Mynning *v.* R. Co., 341.
Myrick *v.* R. Co., 103, 107.

N.

Naglee *v.* Lyman, 54.
Najac *v.* R. Co., 103, 285, 291.
Napier *v.* Central Bank, 65.
Nash *v.* Mosher, 21.
Nash *v.* Page, 47.
Nashua Lock Co. *v.* R. Co., 103.
Nashville &c. R. Co. *v.* Carroll, 293.
Nashville &c. R. Co. *v.* David, 120, 128.
Nashville &c. R. Co. *v.* Elliott, 231, 271.
Nashville &c. R. Co. *v.* Estis, 129.
Nashville &c. R. Co. *v.* Jackson, 137, 162.
Nashville &c. R. Co. *v.* Jones, 236.
Nashville &c. R. Co. *v.* Messino, 217, 219, 233.
Nashville &c. R. Co. *v.* Smith, 347.
Nashville &c. R. Co. *v.* Sprayberry, 100, 291.
Nashville &c. R. Co. *v.* Starnes, 297.
Nashville &c. R. Co. *v.* State, 88.
Nathan *v.* Shivers, 214.
Nathaniel Hooper, The, 213.
National Bank *v.* R. Co., 115.
Nave *v.* Pac. Ex. Co., 337.
Navigation Co. *v.* Dwyer, 122.
Naylor *v.* Mangles, 27.
Neal *v.* R. Co., 40.
Neal *v.* Saunderson, 121, 123.
Neal *v.* State, 37, 47, 202.
Neal *v.* Wilcox, 74, 76, 79.
Needles *v.* Howard, 33, 73, 79, 270.
Neff *v.* Thompson, 15.
Negus *v.* Simpson, 29.
Nehrbas *v.* R. Co., 341.
Neil *v.* Wilcox, 74.
Neir *v.* R. Co., 347.
Nelson *v.* Brown, 8.
Nelson *v.* Edwards, 62.
Nelson *v.* King, 29.
Nelson *v.* Mackintosh, 83.
Nelson *v.* Nat. Steam. Co., 137, 162.
Nelson *v.* R. Co., 102, 139, 157, 242, 256, 261, 296, 341.
Nelson *v.* Stephenson, 170.
Nelson *v.* Wellington, 58.
Nelson *v.* Woodruff, 334.
Nemours *v.* Vance, 166.
Ness *v.* Stephenson, 327.
Nettles *v.* R. Co., 200, 345.
Neran *v.* Roup, 51.
Nevin *v.* Pull. Pal. Car Co., 324.
Nevins *v.* Bay State Steamb. Co., 139, 240, 272, 286.
Nevins *v.* Peoria, 301.
Nevins *v.* R. Co., 272.
Newark, The, 166.
Newberger *v.* Ex. Co., 153.
Newberger *v.* Howard, 142.
New Brunswick Steam Co. *v* Tiers, 122, 123, 124, 125, 135, 338.
Newby *v.* R. Co., 132, 135.
Newell *v.* Smith, 154.
New England Ex. Co. *v.* R. Co., 91, 95.
Newhall *v.* Paige, 5, 31, 32.
New Jersey, The, *v.* Olcott, 166.
New Jersey Ex. Co. *v.* Nichols, 341.
New Jersey R. Co. *v.* Kennard, 307.
New Jersey Steam Co. *v.* Brockett, 298, 299.
New Jersey Steam Co. *v.* Merchants' Bk., 95, 109, 137, 142, 162, 338.
New Orleans, The, 338.
New Orleans Ins. Co. *v.* R. Co., 137, 162, 338.
New Orleans &c. R. Co. *v.* Allbritton, 297, 340, 348.
New Orleans &c. R. Co. *v.* Burke, 302.
New Orleans &c. R. Co. *v.* Faler, 137, 140, 162.
New Orleans &c. R. Co. *v.* Hurst, 250, 253, 298, 347, 348.
New Orleans &c. R. Co. *v.* Reese, 301.
New Orleans &c. R. Co. *v.* Schneider, 307.
New Orleans &c. R. Co. *v.* Statham, 253, 269, 347, 348.
Newport, The, 213.
Newport &c. Bridge Co. *v.* Douglass, 53.
Newson *v.* Axon, 76, 333.
Newton *v.* Pope, 45.
New York &c. R. Co. *v.* Ball, 266.
New York &c. R. Co. *v.* Burns, 226.
New York &c. R. Co. *v.* Davies, 57.

The References are to Sections.

New York &c. R. Co. *v.* Doane, 234, 266.
New York &c. R. Co. *v.* Schuyler, 56.
New York &c. Steam. Co. *v.* Wright, 101.
NewYork &c. Tel. Co. *v.* Dryburg, 316, 317, 318, 319, 320, 322, 349.
New World, The, *v.* King, 11, 137, 246, 340.
Niagara Bk. *v.* Brown, 270.
Niagara, The *v.* Cordes, 83, 84, 166, 338.
Nicholas *v.* R. Co., 139, 162.
Nichols *v.* Halliday, 82.
Nichols *v.* R. Co., 307.
Nicholson *v.* R. Co., 230, 234.
Nicholson *v.* Willan, 136, 142.
Nieto *v.* Clark, 298.
Nines *v.* R. Co., 107.
Nisbet *v.* Trust Co., 51.
Nith, The, 160, 162, 166, 170.
Nitro-glycerine Case, 96, 212.
Noble *v.* Milliken, 81.
Nolan *v.* R. Co., 242, 265, 306.
Noland *v.* Clark, 58.
Noles *v.* Marable, 68.
Nolton *v.* R. Co., 225.
Nora, The, 182.
Norcross *v.* Norcross, 74, 76, 77, 327.
Norfolk &c. R. Co. *v.* Irvine, 274, 276.
Norfolk &c. R. Co. *v.* Wysor, 263.
Norman *v.* Phillips, 211.
Norris *v.* R. Co., 120.
Norris *v.* Staps, 24.
Norristown *v.* Mayer, 347.
North *v.* Merchants' Trans. Co., 102, 107.
North. &c. R. Co. *v.* Page, 262.
North. &c. R. Co. *v.* Scholl, 291.
North. &c. R. Co. *v.* Shepherd, 133.
North. &c. R. Co. *v.* State, 341.
Northampton Bank *v.* Mass. Co., 66.
Northrup *v.* Pass. Ass. Co., 228.
Northrup *v.* R. Co., 201.
Northwest R. Co. *v.* Hack, 298.
Norton *v.* Squire, 65.
Norton *v.* Woodruff, 8.
Norway Plains Co. *v.* R. Co., 40, 47, 84, 123, 201, 202.
Norwich Trans. Co. *v.* Wright, 121.
Notara *v.* Henderson, 214.
Nottebohm *v.* Maas, 67.
Nourse *v.* Prime, 61, 65.
Nowell *v.* Wright, 330.
Nudd *v.* Montanyne, 19.
Nugent *v.* Smith, 83, 118, 120.
Nutting *v.* R. Co., 102, 107.

O.

Oakes *v.* Moore, 26.
Oakes *v.* R. Co., 272, 278.
Oakey *v.* Gordon, 101, 108.
Oakey *v.* Russell, 84.
Oakley *v.* State, 8.
Oakley *v.* Steam Packet Co., 125.
O'Bannon *v.* Ex. Co., 112, 116.
Oberfelder *v.* Doran, 329.
O'Brien *v.* Bound, 28.
O'Brien *v.* Cunard S. S. Co., 300.
O'Brien *v.* Gilchrist, 160.
O'Brien *v.* R. Co., 220, 256, 260.
O'Brien *v.* West Steel Co., 329.
O'Brien *v.* Vaill, 78.
Ocean S. S. Co. *v.* McAlpin, 338.
Ocean Wave, The, 166, 338.
Och *v.* R. Co., 340.
O'Connor *v.* Forster, 345.
O'Donnell *v.* R. Co., 220, 226, 312.
Ogden *v.* Lathrop, 57, 62, 66.
Ohio &c. R. Co. *v.* Applewhite, 268.
Ohio &c. R. Co. *v.* Davies, 295.
Ohio &c. R. Co. *v.* Dickerson, 266, 347.
Ohio &c. R. Co. *v.* Dunbar, 84, 86, 130, 296.
Ohio &c. R. Co. *v.* Enrich, 106.
Ohio &c. R. Co. *v.* Muhling, 220, 226, 246, 260, 266.
Ohio &c. R. Co. *v.* Nickless, 246.
Ohio &c. R. Co. *v.* Schiebe, 308.
Ohio &c. R. Co. *v.* Selby, 137, 245, 247, 266.
Ohio &c. R. Co. *v.* Stratton, 300, 308, 314.
Ohio &c. R. Co. *v.* Swarthout, 241.
Ohio &c. R. Co. *v.* Yohe, 131, 209.
Ohrloff *v.* Briscall, 172.
Oil Creek &c. R. Co. *v.* Clark, 241, 268.
Olbers, The, 162, 170, 338.
Olsom *v.* Crossman, 80, 81.
Olson *v.* R. Co., 266.
Olwell *v.* Adams Ex. Co., 137.
O'Mara *v.* R. Co., 314.
Oncalt *v.* Durling, 15.
Onderkirk *v.* Central Nat. Bk., 31.
O'Neil *v.* R. Co., 112.
O'Neil *v.* Wigham, 65.
Onrust, The, 131.
Ontario Bk. *v.* Hanlan, 160.
Oppenheim *v.* White Lion Hotel, 76, 80.
Oppenheimer *v.* Ex. Co., 133, 141, 142, 144, 160.
Oppenheimer *v.* R. Co., 242.
Orange County Bk. *v.* Brown, 133, 270, 271, 272.
Oregon &c. Trans. Co. *v.* Hilmers, 61.
Oriflamme, The, 160, 162, 170, 338.
Ormond *v.* Hughes, 228.
Ormsby *v.* R. Co., 137, 158, 204.
Orndorff *v.* Ex. Co., 137, 142, 155.
O'Rourke *v.* R. Co., 101.
O'Rourke *v.* 220 Tons of Coal, 160.
Orr *v.* R. Co., 107.
Orser *v.* Storms, 15.
Ortt *v.* R. Co., 107, 137.
Osborn *v.* Union Ferry Co., 234.
Osgoodby *v.* Lieberner, 5.
Ostrander *v.* Brown, 201.
Ouimet *v.* Henshaw, 115, 202, 272, 286.
Overland Mail Co. *v.* Carroll, 84, 102, 137, 142, 162.
Overlock *v.* Hills, 58.
Overseers *v.* Warner, 72.
Oviatt *v.* R. Co., 266.
Owen *v.* R. Co., 108, 158.
Owens *v.* Geiger, 45.

The References are to Sections.

Owens *v.* Kinsey, 51.
Owens *v.* R. Co., 341, 347.
Oxford *v.* Peter, 297.
Oxley *v.* R. Co., 137, 162.

P.

Pacific, The, 109, 137, 140, 160, 221, 222.
Pac. Ex. Co. *v.* Black, 345.
Pac. Ex. Co. *v.* Darnell, 345.
Pac. Post. Tel. Co. *v.* Fleischer, 320.
Pac. R. Co. *v.* Miller, 340.
Pac. R. Co. *v.* Stults, 115.
Pack *v.* Mayor, 347.
Packer *v.* Gillies, 54.
Packard *v.* Getman, 113, 116.
Packard *v.* Earle, 201.
Packard *v.* Northcraft, 77, 80, 81.
Packard *v.* Taylor, 105, 124.
Paddock *v.* R. Co., 269.
Paducah &c. R. Co. *v.* Hoehl, 341.
Paige *v.* Smith, 295.
Paine *v.* R. Co., 347.
Palmari *v.* R. Co., 298.
Palmer *v.* Holland, 103.
Palmer *v.* R. Co., 86, 104, 105, 241, 244.
Palmeter *v.* Wagner, 325, 328.
Palmtag *v.* Doutrick, 57.
Pandorf *v.* Hamilton, 166.
Pardee *v.* Drew, 84, 270, 272.
Pardington *v.* R. Co., 86.
Park *v.* O'Brien, 341
Park *v.* Preston, 156, 335.
Parker *v.* Adams, 341.
Parker *v.* Brauckner, 62.
Parker *v.* Brinson, 161.
Parker *v.* Browning, 295.
Parker *v.* Flagg, 84, 123.
Parker *v.* James, 129.
Parker *v.* Lombard, 20, 22, 48.
Parker *v.* Marquis, 24.
Parker *v.* R. Co., 298.
Parker *v.* Tiffany, 13.
Parks *v.* Hall, 51.
Parks *v.* Tel. Co., 317, 349.
Parmelee *v.* Fischer, 272.
Parmelee *v.* Lowitz, 84, 217.
Parmelee *v.* McNulty, 84.
Parmelee *v.* Wilks, 205.
Parshall *v.* Eggert, 51, 54.
Parsons *v.* Hardy, 84, 120, 123, 204.
Parsons *v.* Monteath, 121, 122, 123, 139.
Parsons *v.* Overmire, 51.
Parsons *v.* R. Co., 228.
Partridge *v.* Dartmouth College, 26.
Passenger R. Co. *v.* Young, 257, 298.
Passmore *v.* Tel. Co., 316, 317, 319.
Patchin *v.* Pierce, 51, 62.
Patria, The, 166.
Patscheider *v.* R. Co., 286, 287.
Patten *v.* R. Co., 234, 347.
Patterson *v.* Clyde, 338.
Patterson *v.* McGahey, 27.
Patterson *v.* McIver, 33.
Patterson *v.* R. Co., 341.
Pattison *v.* Blanchard, 103.
Pattison *v.* Syracuse Nat. Bk., 31.
Pattison *v.* Wallace, 13.
Patton *v.* Johnson, 135.
Patton *v.* Magrath, 121, 122.
Patton *v.* R. Co., 302.
Paturzo *v.* Compagnie Francaise, 162
Paulet *v.* R. Co., 301.
Paulin *v.* R. Co., 269.
Paulitsch *v.* R. Co., 227, 241.
Paulmier *v.* R. Co., 297.
Pawlett *v.* R. Co., 300.
Payne *v.* Bensley, 54.
Peabody *v.* R. Co., 244.
Pearsall *v.* Tel Co., 319.
Pearson *v.* Duane, 96, 223, 224.
Pease *v.* R. Co., 256.
Peck *v.* Neil, 348.
Peck *v.* R. Co., 88, 257, 265, 278, 336.
Peck *v.* Weeks, 137, 140, 143.
Peebles *v.* Farrar, 19.
Peeples *v.* R. Co., 298.
Peet *v.* McGraw, 76, 82.
Peet *v.* R. Co., 97, 204, 345.
Pegram *v.* Tel. Co., 320, 349.
Peixotti *v.* McLaughlin, 217, 271.
Pelton *v.* R. Co., 202.
Pemberton Co. *v.* R. Co., 101, 137, 160, 162.
Pender *v.* Robbins, 83.
Pendergast *v.* Adams Ex. Co., 101, 103.
Pendleton *v.* Kinsley, 298, 299.
Peninusular &c. Co. *v.* Shand, 162.
Peniston *v.* R. Co., 234, 252.
Penn *v.* R. Co., 86, 135, 162, 190.
Penn. Canal Co. *v.* Bentley, 341.
Penn. Canal Co. *v.* Burd, 43, 84.
Pennewill *v.* Cullen, 49, 83, 121.
Pennington *v.* R. Co., 242.
Pennington *v.* Tel. Co., 349.
Penn. R. Co. *v.* Aspell, 254, 304, 308, 346.
Penn. R. Co. *v.* Books, 225, 347, 348.
Penn. R. Co. *v.* Butler, 139, 248.
Penn. R. Co. *v.* Connell, 244.
Penn. R. Co. *v.* Fairchild, 162.
Penn. R. Co. *v.* Gallagher, 230.
Penn. R. Co. *v.* Goodman, 347.
Penn. R. Co. *v.* Henderson, 139, 234, 247.
Penn. Co. *v.* Hine, 244.
Penn. Co. *v.* Hoagland, 253.
Penn. R. Co. *v.* Kilgore, 253, 308, 347.
Penn. R. Co. *v.* Langdon, 255, 312.
Penn. R. Co. *v.* Miller, 272.
Penn. R. Co. *v.* McCloskey, 137, 247, 312.
Penn. R. Co. *v.* McTighe, 341.
Penn. R. Co. *v.* Price, 225.
Penn. R. Co. *v.* Raiordan, 139, 338, 340.
Penn. R. Co. *v.* Roy, 232, 293.
Penn. R. Co. *v.* Schwarzenberger, 101, 139, 291.
Penn. R. Co. *v.* Spicker, 242, 268, 300.
Penn. R. Co. *v.* State, 230.
Penn. R. Co. *v.* Stern, 206.
Penn. R. Co. *v.* Vandiver, 257, 298.
Penn. R. Co. *v.* Zebe, 234.
Penton *v.* R. Co., 286, 287.
People *v.* Caryl, 262.

The References are to Sections.

People *v.* Gillson, 88.
People *v.* Jillson, 256, 261.
People *v.* Jones, 72.
People *v.* McKay, 264.
People *v.* R. Co., 89.
People *v.* Squire, 88.
Peoples' Bank *v.* Morgolofski, 329.
Peoples Pass. Co. *v.* Green, 308.
Peoria &c. R. Co. *v.* Reynolds, 340.
Peoria &c. R. Co. *v.* R. Co., 89.
Peoria &c. R. Co. *v.* Thompson, 232.
Pepper *v.* Tel. Co., 319, 320, 349.
Percy *v.* Millandon, 33.
Pereira *v.* R. Co., 109, 160.
Pererie, The, 162, 338.
Perez *v.* R. Co., 315.
Perkins *v.* R. Co., 100, 107, 139, 236, 240, 246, 248, 341, 345, 348.
Perkins *v.* Wright, 270, 271.
Perley *v.* R. Co., 278.
Perry *v.* Craig, 62.
Perry *v.* R. Co., 227.
Perry *v.* Thompson, 137, 154, 156.
Persch *v.* Quiggle, 21, 33.
Pesch *v.* Consolidation Bk., 344.
Peters *v.* R. Co., 90.
Peters *v.* Rylands, 231, 293.
Peterson, in re, 102, 104.
Peterson *v.* Case, 204.
Peterson *v.* R. Co., 290.
Petrie *v.* Heller, 160.
Petrie *v.* R. Co., 244.
Pettibone *v.* Griswold, 53.
Pettigrew *v.* Barnum, 76, 79.
Pettit *v.* First Nat. Bk., 51.
Petty *v.* Overall, 58.
Peverly *v.* City of Boston, 307.
Peytona, The, 201.
Pfister *v.* R. Co., 272, 274.
Pharos, The, 337.
Pharr *v.* Collins, 215.
Phelan *v.* The Alvarado, 166.
Phelps *v.* Bostwick, 29.
Phelps *v.* People, 5.
Phelps *v.* R. Co., 272.
Phifer *v.* R. Co., 101, 137, 148.
Phila. &c. R. Co. *v.* Anderson, 233, 340.
Phila. &c. R. Co. *v.* Derby, 246, 249.
Phila. &c. R. Co. *v.* Hassard, 308.
Phila. &c. R. Co. *v.* Hoflich, 260.
Phila. &c. Co. *v.* King, 11, 139.
Phila. &c. R. Co. *v.* Larkin, 257.
Phila. &c. R. Co. *v.* Lehman, 102, 205.
Phila. &c. R. Co. *v.* Ramsey, 103.
Phila. &c. R. Co. *v.* Rice, 244.
Phila. &c. R. Co. *v.* Thompson, 232.
Philips *v.* Clark, 162.
Philips *v.* Harriss, 15.
Philleo *v.* Sanford, 84.
Phillips *v.* Brigham, 127.
Phillips *v.* Cardon, 38.
Phillips *v.* Earle, 114, 133.
Phillips *v.* Evans, 327.
Phillips *v.* Henson, 327.
Phillips *v.* R. Co., 107, 308, 347.
Phillips *v.* Rodie, 215.
Phillips *v.* Thompson, 53.
Phoenix Ins. Co. *v.* Erie &c. Trans. Co., 137, 149.
Pickering *v.* Barkley, 166.
Pickersgill *v.* Brown, 55.
Pickering *v.* Busk, 214.
Picketts *v.* R. Co., 298.
Pickford *v.* R. Co., 94, 95, 155.
Picquet *v.* McKay, 26.
Piedmont Mfg. Co. *v.* R. Co., 101, 107, 139.
Pier *v.* Finch, 242.
Pierce *v.* R. Co., 98.
Pierce *v.* Sweet, 27.
Pierce *v.* Winsor, 212.
Pigot *v.* Cubley, 62, 63, 66.
Pike *v.* Marsh, 83.
Pike *v.* R. Co., 40, 287.
Pilgreen *v.* State, 211.
Pindell *v.* Grooms, 52.
Pinkerton *v.* R. Co., 51, 52.
Pinkerton *v.* Woodward, 72, 73, 74, 76, 79, 272, 327.
Pinkham *v.* Gear, 15.
Pinney *v.* R. Co., 202.
Pinney *v.* Wells, 26.
Piper *v.* Manny, 76, 77, 333.
Pitlock *v.* Wells, 95.
Pitre *v.* Offutt, 86.
Pittsburgh &c. R. Co. *v.* Andrews, 307, 347.
Pitts. &c. R. Co. *v.* Barrett, 137.
Pitts. &c. R. Co. *v.* Berryman, 268.
Pitts. &c. R. Co. *v.* Bingham, 230.
Pitts. &c. R. Co. *v.* Brown, 88.
Pitts. &c. R. Co. *v.* Caldwell, 225.
Pitts. &c. R. Co. *v.* Hazen, 204.
Pitts. &c. R. Co. *v.* Hennigh, 244, 262.
Pitts. &c. R. Co. *v.* Hinds, 265, 302.
Pitts. &c. R. Co. *v.* Hollenback, 204.
Pitts. &c. R. Co. *v.* Hollowell, 204.
Pitts. &c. R. Co. *v.* Krause, 229.
Pitts. &c. R. Co. *v.* Martin, 308.
Pittsburg &c. R. Co. *v.* McClurg, 269. 307.
Pitts. &c. R. Co. *v.* Morton, 101, 130.
Pitts. &c. R. Co. *v.* Nazum, 268.
Pitts. &c. R. Co. *v.* Nelson, 236.
Pitts. &c. R. Co. *v.* Noel, 341.
Pitts. &c. R. Co. *v.* Nuzum, 241, 253.
Pittsburg &c. R. Co. *v.* Pillow, 223, 302.
Pitts. &c. R. Co. *v.* Slusser, 298, 348.
Pitts. &c. R. Co. *v.* Theobald, 298.
Pitts. &c. R. Co. *v.* Thompson, 340.
Pittsburg &c. R. Co. *v.* Vandyne, 223, 262, 267.
Pitts. &c. R. Co. *v.* Vining, 341.
Pitts. &c. R. Co. *v.* Williams, 340.
Pitts. Steel Co. *v.* Hinckley, 344.
Pixotti *v.* McLaughlin, 84, 270.
Place *v.* Union Ex. Co., 158, 205.
Plaisted *v.* Boston Steam Nav. Co., 122, 166.
Plaster *v.* R. Co., 341.
Platt *v.* Hibbard, 40, 47, 48, 49.
Platt *v.* R. Co., 229.
Playford *v.* Tel. Co., 318.
Pleasants *v.* R. Co., 218.
Plessy, ex parte, 265.
Plum *v.* Jarnier, 74.
Pollard *v.* R. Co., 307.
Pollock *v.* Landis, 72, 82.
Polynesia, The, 337.

The References are to Sections.

Pomeroy *v.* Donaldson, 84.
Pomeroy *v.* Smith, 68.
Ponce *v.* McElvy, 52.
Poole *v.* R. Co., 312.
Poole *v.* Symonds, 15.
Pope *v.* Hall, 80.
Pope *v.* Tel. Co., 317.
Pope's Case, 295.
Porcher *v.* R. Co., 96.
Porter *v.* Hildebrand, 272.
Porter *v.* Petersgill, 8.
Porter *v.* R. Co., 202, 261, 347.
Porter *v.* South. Ex. Co., 139, 158, 162, 191.
Porter *v.* The New England, 250, 346.
Porterfield *v.* Humphreys, 84, 86.
Portsmouth, The, 166.
Portuense, The, 162, 338.
Post *v.* R. Co., 243.
Post *v.* Tradesman's Bank, 53.
Postal Tel. Co. *v.* Lathrop, 349.
Pothonier *v.* Dawson, 26.
Potter *v.* Lansing, 211.
Potter *v.* R. Co., 234, 341.
Potter *v.* Thompson, 52, 61, 62.
Potts *v.* R. Co., 137.
Poucher *v.* R. Co., 192, 227, 248.
Poulin *v.* R. Co., 253.
Powder Co. *v.* Burkhardt, 8.
Powell *v.* Deveney, 297.
Powell *v.* Layton, 125.
Powell *v.* Mills, 84, 95.
Powell *v.* Myers, 84, 270, 271.
Powell *v.* R. Co., 86, 130, 139, 162, 242.
Powers *v.* Davenport, 83, 127.
Powers *v.* Mitchell, 40, 49.
Powers *v.* R. Co., 266.
Pozzi *v.* Shipton, 89.
Praeger *v.* R. Co., 254.
Prall *v.* Tilt, 57.
Prather *v.* Kean, 33.
Prather *v.* R. Co., 341.
Pratt *v.* R. Co., 104, 135.
Prendergast *v.* Compton, 267.
Prentice *v.* Decker, 139, 150.
Prentiss *v.* Boston, 341.
Preston *v.* Neale, 5, 25.
Pribble *v.* Kent, 22.
Price *v.* Dime Sav. Bank, 55.
Price *v.* Hartshorn, 213.
Price *v.* Powell, 170.
Price *v.* R. Co., 110, 206.
Price *v.* The Uriel, 338.
Prideaux *v.* Mineral Point, 341.
Priest *v.* R. Co., 298.
Primrose *v.* Tel. Co., 316, 317, 320, 349.
Profilet *v.* Hall, 79, 80.
Propeller Commerce, The, 84.
Propst *v.* Roseman, 51.
Pruitt *v.* R. Co., 125, 204.
Pugh *v.* Tel. Co., 323.
Pullan *v.* R. Co., 295.
Pulliam *v.* Burlingame, 19.
Pull. Pal. Car Co. *v.* Barker, 347.
Pull. Pal. Car.Co. *v.* Bates, 324.
Pull. Pal. Car Co. *v.* Booth, 250.
Pull. Pal. Car Co. *v.* Ehrman, 324.
Pull. Pal. Car Co. *v.* Freudenstein, 289, 324, 325, 342.
Pull. Pal. Car. Co. *v.* Gardner, 325, 328.
Pull. Pal. Car Co. *v.* Lowe, 326.
Pull. Pal. Car Co. *v.* Martin, 328.
Pull. Pal. Car Co. *v.* Matthews, 328.
Pull. Pal. Car Co. *v.* Pollock, 325, 328.
Pull. Pal. Car Co. *v.* Reed, 262, 347.
Pull. Pal. Car Co. *v.* Smith, 324.
Pull. Pal. Car Co. *v.* Taylor, 324.
Purcell *v.* South. Ex. Co., 140.
Purvis *v.* Coleman, 80, 81.
Putnam *v.* R. Co., 223, 267, 302.
Putnam *v.* Wyley, 15, 37, 41.
Pym *v.* R. Co., 231, 304.

Q.

Quaife *v.* R. Co., 234.
Quarman *v.* Bennett, 301.
Quigley *v.* R. Co., 298, 347, 348.
Quimby *v.* R. Co., 240, 248, 249.
Quimby *v.* Vanderbilt, 103, 240, 291, 346.
Quinn *v.* R. Co., 306.

R.

R. *v.* Ivens, 73, 89.
R. *v.* Rymer, 72, 73, 74.
Raben *v.* R. Co., 253.
Race *v.* Hansen, 45.
Rafferty *v.* New Brunswick Fire Ins. Co., 72.
Ragan *v.* Aiken, 92.
Ragstadt *v.* R. Co., 230.
Rahilly *v.* Wilson, 8.
R. Co. *v.* Androscroggin Mills, 101, 101, 103, 108.
R. Co. *v.* Barrett, 112.
R. Co. *v.* Barron, 294, 296.
R. Co. *v.* Beaver, 247.
R. Co. *v.* Beckwith, 348.
R. Co. *v.* Boring, 296.
R. Co. *v.* Caldwell, 137.
R. Co. *v.* Chollette, 304.
R. Co. *v.* Copeland, 285.
R. Co. *v.* Cowser, 341.
R. Co. *v.* Dunn, 348.
R. Co. *v.* Fraloff, 133, 270, 272, 276, 277.
R. Co. *v.* Fuller, 88.
R. Co. *v.* Gladman, 341.
R. Co. *v.* Halloran, 233.
R. Co. *v.* Harris, 348.
R. Co. *v.* Hinds, 223.
R. Co. *v.* Humes, 348.
R. Co. *v.* Humphreys, 295.
R. Co. *v.* Iron Co., 60.
R. Co. *v.* Jones, 132, 306.
R. Co. *v.* Keys, 275.
R. Co. *v.* Kidd, 202.
R. Co. *v.* Lockwood, 137, 138, 139, 154, 161, 245, 247, 248, 320.
R. Co. *v.* Manufacturing Co., 102, 104, 107, 137, 140, 154.
R. Co. *v.* Mitchell, 340.

The References are to Sections.

R. Co. *v.* Murphy, 341.
R. Co. *v.* O'Hara, 248.
R. Co. *v.* Quigley, 348.
R. Co. *v.* Pollard, 307, 340.
R. Co. *v.* Pratt, 101, 103, 107, 109, 137.
R. Co. *v.* Redeker, 341.
R. Co. *v.* Reeves, 126, 128.
R. Co. *v.* Skillman, 261.
R. Co. *v.* Slattery, 341.
R. Co. *v.* Stevens, 137.
R. Co. *v.* Velleley, 257, 267, 302.
R. Co. *v.* Walrath, 293.
Raisler *v.* Oliver, 330.
Ramaley *v.* Leland, 76, 80.
Ramsden *v.* R. Co., 257, 298.
Ramtzy *v.* R. Co., 242.
Rand *v.* Merchants' Desp. Co., 162.
Rand *v.* R. Co., 137.
Rand *v.* State Bk., 28.
Ranger *v.* R. Co., 136.
Rankin *v.* Craft, 8.
Rankin *v.* R. Co., 202.
Rankin *v.* Packet Co., 26, 214.
Ranney *v.* Higby, 211.
Ransom *v.* R. Co., 347.
Rapp *v.* Palmer, 214.
Ratcliff *v.* Vance, 57.
Rathborne *v.* Neal, 204, 345.
Rathbun *v.* Steam Co., 185.
Rawson *v.* Holland, 102, 109, 204.
Rawson *v.* R. Co., 139, 156, 240.
Rawson in re, 70.
Ray *v.* The Milwaukee Belle, 166.
Ray *v.* Tubbs, 21, 42.
Raymond *v.* Tyson, 215.
Rea *v.* Simmons, 33.
Rea *v.* Trotter, 31.
Read *v.* Amidon, 74, 80, 81.
Read *v.* R. Co., 137, 338.
Read *v.* Spaulding, 84, 120, 123, 126, 193, 205.
Reading *v.* Menkham, 13.
Reading *v.* Price, 24.
Reagan *v.* R. Co., 102.
Remer *v.* Davis, 48.
Reaves *v.* Waterman, 122.
Rebecca, The, 166.
Redding *v.* R. Co., 297.
Redhead *v.* R. Co., 24, 231, 232, 298, 301.
Redington *v.* Tel. Co., 342.
Redmond *v.* Steam Co., 201, 202.
Redpath *v.* Tel. Co., 319, 320.
Redpath *v.* Vaughan, 166.
Reed *v.* Abbey, 8.
Reed *v.* Axtell, 234.
Reed *v.* Crowe, 332.
Reed *v.* R. Co., 162, 238.
Reed *v.* U. S. Ex. Co., 101, 103, 104, 107.
Reeder *v.* Anderson, 24.
Reese *v.* Tel. Co., 350.
Reeside, The, 84, 166.
Reeves *v.* Capper, 70.
Reeves *v.* Plough, 58.
Reeves *v.* The Constitution, 42.
Reeves *v.* Waterman, 166.
Reilly *v.* Rand, 41.
Reineman *v.* R. Co., 26.
Reizenstein *v.* Marquardt, 29, 60.
Reliance Lumber Co. *v.* Tel. Co., 349.
Relle *v.* Tel. Co., 350.
Remicke *v.* Atkinson, 13.
Rennecker *v.* R. Co., 234.
Reno *v.* Hogan, 137, 162.
Rentoul *v.* R. Co., 118.
Revara *v.* Ohio, 25.
Rex *v.* Kilderby, 24.
Rey *v.* Toney, 45.
Reynolds *v.* Hindman, 341.
Reynolds *v.* Shuler, 16.
Reynolds *v.* Toppan, 115.
Rhodes *v.* R. Co., 137, 162.
Rice *v.* Benedict, 58.
Rice *v.* Hart, 201.
Rice *v.* R. Co., 137, 158, 246.
Rich *v.* Lambert, 166, 337, 338.
Richards *v.* Davis, 62, 65, 66.
Richards *v.* Doe, 160.
Richards *v.* Hansen, 84, 162, 166, 337.
Richards *v.* R. Co., 289.
Richards *v.* The Chas. P. Chouteau, 103.
Richards *v.* Westcott, 84, 217, 272.
Richardson *v.* Goddard, 203.
Richardson *v.* Ins. Co., 65.
Richardson *v.* Sibley, 295.
Richmond *v.* Smith, 76.
Richmond &c. R. Co. *v.* Ashley, 241.
Richmond &c. R. Co. *v.* Jefferson, 265.
Richmond Turn. Co. *v.* Vanderbilt, 297.
Rickerson &c. Co. *v.* R. Co., 101.
Ricketts *v.* R. Co., 101, 296.
Ricketts *v.* Tel. Co., 350.
Ridenhour *v.* R. Co., 269.
Riest *v.* Goschen, 341.
Rigby *v.* Hewitt, 315.
Riley *v.* Horne, 96, 97, 119, 136, 143, 144, 232.
Riley *v.* R. Co., 115, 160, 341.
Rindge *v.* Inhabitants, 15.
Ringling *v.* Kohn, 52.
Ripley *v.* N. J. Trans. Co., 262.
Rittenhouse *v.* Ind. Line, 342.
Rittenhouse *v.* Tel. Co., 349.
Ritz *v.* R. Co., 86, 139.
Rixford *v.* Smith, 86, 119.
Robbins *v.* Chicago, 301.
Robbins *v.* Mount, 340.
Roberts *v.* Johnson, 253, 340.
Roberts *v.* Koehler, 241.
Roberts *v.* Riley, 137, 156, 160.
Roberts *v.* Thompson, 58.
Roberts *v.* Turner, 49, 84, 119.
Roberts *v.* Wyatt, 70.
Roberts *v.* Yarboro, 23.
Robertson *v.* Kennedy, 83, 84, 121, 123.
Robertson *v.* Lippincott, 62.
Robertson *v.* R. Co., 306.
Robinson *v.* Baker, 215.
Robinson *v.* Chamberlain, 330.
Robinson *v.* Dunmore, 13, 83.
Robinson *v.* Frost, 53.
Robinson *v.* Hurley, 62, 65.
Robinson *v.* Merchants' Disp. Co., 103, 109, 196.

The References are to Sections.

Robinson *v.* Merch. Trans. Co., 148, 162, 196, 205.
Robinson *v.* Parnell, 21.
Robinson *v.* R. Co., 115, 232, 241, 268, 340, 341.
Robinson *v.* Smith, 54.
Robinson *v.* Webb, 301.
Robostell *v.* R. Co., 243.
Rocket, The, 137, 166, 338.
Rockford &c. R. Co. *v.* Heflin, 296.
Rockwell *v.* Proctor, 76.
Roderick *v.* R. Co., 135.
Rodgers *v.* Stophel, 48.
Rogers *v.* Arnold, 15.
Rogers *v.* Head, 83.
Rogers *v.* Kenebec Steam. Co., 240, 248, 249.
Rogers *v.* R. Co., 115, 281.
Rogers *v.* Tel. Co., 316.
Rogers *v.* Weir, 19.
Rogers *v.* Wheeler, 295.
Rogers Loc. Works *v.* R. Co., 84.
Rohile *v.* Stidger, 53.
Rommel *v.* Schambacher, 75.
Roof *v.* R. Co., 341.
Root *v.* Chandler, 15.
Root *v.* R. Co., 103, 104, 107.
Root *v.* Sleeping Car Co., 311, 325, 328.
Rooth *v.* Wilson, 38.
Rose *v.* R. Co., 137, 244, 248.
Rose *v.* Stephens &c. Trans. Co., 340.
Rose *v.* Tel. Co., 318.
Rosenbaum *v.* R. Co., 225.
Rosenfeld *v.* R. Co., 137, 142, 154, 162, 335.
Rosenfield *v.* Ex. Co., 209.
Rosenfluter *v.* Roessle, 81.
Rosenstein *v.* R. Co., 193.
Ross *v.* Clark, 29.
Ross *v.* Mellin, 74.
Ross *v.* R. Co., 135, 278, 287.
Rotch *v.* Hawes, 21.
Roth *v.* R. Co., 271, 286, 287.
Roulston *v.* McClelland, 10, 22, 29.
Rounds *v.* R. Co., 257, 297.
Rowell *v.* Tel. Co., 350.
Rowland *v.* Miln, 201.
Rowley *v.* Horne, 144.
Rowning *v.* Goodchild, 330.
Rozelle *v.* Rhodes, 30, 33.
Rozet *v.* McClellan, 52, 65.
Rubenstein *v.* Cruikshanks, 80.
Rucker *v.* Donovan, 26.
Rucker *v.* R. Co., 225.
Rugely *v.* Ins. Co., 214.
Rumpf *v.* Barto, 8.
Runyan *v.* Caldwell, 332.
Rusch *v.* Davenport, 341.
Rushforth *v.* Hadfield, 26, 215.
Russell *v.* Favier, 17.
Russell *v.* Fillmore, 70.
Russell *v.* Hester, 58.
Russell *v.* Koehler, 40, 43.
Russell *v.* Nieman, 129.
Russell *v.* R. Co., 226.
Russell *v.* Roberts, 344.
Russell *v.* Tel. Co., 351.
Russell Man. Co. *v.* Steam. Co., 203.
Rutgers *v.* Lucet, 10, 22.
Ryan *v.* Gilmer, 340.
Ryan *v.* R. Co., 226, 338, 341.

S.

Sachrowitz *v.* R. Co., 300.
Safe Deposit Co. *v.* Pollock, 13, 39, 45
Sager *v.* R. Co., 127, 137, 146, 338.
Sales *v.* West. Stage Co., 231.
Sallee *v.* Arnold, 15.
Saltonstall *v.* Stockton, 340.
Saltus *v.* Everett, 26, 214.
Saltus *v.* Gerrin, 61.
Samms *v.* Stewart, 83.
Sampson *v.* Gazzam, 166.
Sampson *v.* Hand, 12.
Samuel *v.* Cheney, 206.
Samuels *v.* McDonald, 5, 10.
Samuels *v.* R. Co., 92.
Samuelson *v.* Mining Co., 301.
San Antonio &c. R. Co. *v.* Bennett, 341.
San Antonio &c. R. Co. *v.* Long, 231.
Sanchez *v.* R. Co., 341.
Sanders *v.* Reister, 341.
Sanders *v.* Stuart, 349.
Sanders *v.* Young, 84.
Sanderson *v.* Frazier, 341.
Sandys *v.* Florence, 75.
Sanford *v.* R. Co., 89, 91, 95, 158, 162, 218, 257, 258, 297, 298.
Sanquer *v.* R. Co., 206.
Santee, The, 158.
Santer *v.* R. Co., 347.
Saratoga, The, 180, 338.
Sarbecker *v.* State, 211.
Sargent *v.* Gile, 8.
Sargent *v.* Slack, 45.
Sargent *v.* Usher, 26.
Sassen *v.* Clark, 77, 78, 79, 270.
Sassier *v.* Clark, 76.
Satterlee *v.* Groat, 83.
Saunders *v.* R. Co., 261, 340.
Savannah &c. R. Co. *v.* Bonand, 238.
Savannah &c. R. Co. *v.* Bryan, 299.
Savannah &c. R. Co. *v.* Collins, 160.
Savannah &c. R. Co. *v.* Pritchard, 196.
Savannah &c. R. Co. *v.* Sloat, 206.
Savannah &c. R. Co. *v.* Wilcox, 131.
Savey, The, 162.
Sawyer *v.* Corse, 330.
Sawyer *v.* R. Co., 231, 340.
Scaife *v.* Farrant, 161.
Scaling *v.* Pull. Pal. Car Co., 325, 328.
Scanmon *v.* Chicago, 301.
Schaeffer *v.* R. Co., 335.
Scheffer *v.* R. Co., 347.
Schenck *v.* Propeller Co., 200.
Schenck *v.* Strong, 21.
Schepeler *v.* Eisner, 62.
Schepers *v.* R. Co., 308.
Schermer *v.* Neurath, 33.
Schieffelin *v.* Harvey, 123, 129, 162, 166.
Schiff *v.* R. Co., 101.

The References are to Sections.

Schmidt *v.* Blood, 27, 40, 47, 328.
Schmidt *v.* R. Co., 314.
Schneider *v.* Evans, 102, 110.
Schneider *v.* U. S., 344.
Schofield *v.* R. Co., 92.
Scholes *v.* Ackerland, 201.
School District *v.* R. Co., 137.
Schopman *v.* R. Co., 291, 293.
Schroeder *v.* R. Co., 103.
Schroyer *v.* Lynch, 330.
Schuerman *v.* R. Co., 341.
Schulter *v.* Adams Ex. Co., 103.
Schwartz *v.* Baer, 40, 47.
Schwartz *v.* Gilmore, 301.
Schwartz *v.* Tel. Co., 320.
Schwerin *v.* McKie, 40, 47.
Scothorn *v.* R. Co., 106.
Scott *v.* Balt. &c. Steam. Co., 169.
Scott *v.* Crane, 22.
Scott *v.* Crews, 58.
Scott *v.* Nat. Bk., 30, 33.
Scovill *v.* Griffith, 204.
Scranton *v.* Baxter, 38.
Scranton *v.* Farmers' Bank, 131.
Scruggs *v.* R. Co., 162.
Sears *v.* Eastern R. Co., 238.
Sears *v.* Wills, 26.
Seargent *v.* Giles, 17.
Searle *v.* Laverick, 45.
Searles *v.* Mann Boudoir Car Co., 324
Seaver *v.* R. Co., 226.
Second *v.* R. Co., 341.
Second Nat. Bk *v.* Ocean Nat. Bk., 31, 58.
Secor *v.* R. Co., 225.
Seevers *v.* Gabel, 13.
Seger *v.* Burkhamstead, 347.
Seigel *v.* Eisen, 307.
Self *v.* Dunn, 83, 98.
Seligman *v.* Armijo, 84, 121, 129, 140.
Seller *v.* The Pacific, 140, 170.
Selma &c. R. Co. *v.* Butts, 84, 104.
Semple &c. Manfg. Co. *v.* Detwiler, 58.
Sensenbrenner *v.* Matthews, 26.
Sessions *v.* R. Co., 29.
Severy *v.* Nicholson, 230.
Sevier *v.* R. Co., 253.
Sewall *v.* Allen, 95.
Seybolt *v.* R. Co., 139, 157, 225.
Seymour *v.* Cook, 78.
Seymour *v.* Greenwood, 257, 297.
Seymour *v.* R. Co., 231, 234, 293.
Seymour *v.* Wyckoff, 8.
Shannon *v.* R. Co., 227.
Sharp *v.* Grey, 232.
Shattuck *v.* Rand, 329.
Shaw *v.* Berry, 76.
Shaw *v.* Ferguson, 27.
Shaw *v.* Kaler, 15.
Shaw *v.* R. Co., 49, 345.
Shaw *v.* Spencer, 57.
Shaw *v.* Wilshire, 70.
Shedd *v.* R. Co., 242.
Sheef *v.* Huntingdon, 341.
Sheets *v.* R. Co., 244.
Sheldon *v.* R. Co., 340.
Sheldon *v.* Robinson, 84, 95.
Shelton *v.* French, 57.
Shelton *v.* Merchants Desp. Co., 109, 156.
Shelton *v.* R. Co., 144, 244.
Shenandoah &c. R. Co. *v.* Moose, 269.
Shenk *v.* Phila. Steam. Co., 334.
Shenk *v.* Propeller C., 201, 206.
Shepherd *v.* Lanfear, 131.
Sheridan *v.* Charlock, 297.
Sheridan *v.* New Quay Co., 209.
Sheridan *v.* R. Co., 269, 312, 313.
Sherley *v.* Billings, 297, 298, 302, 347.
Sherlock *v.* Alling, 340.
Sherman *v.* R. Co., 225, 242.
Sherman *v.* Steam. Co., 112, 162.
Sherman *v.* Wells, 84.
Sherrill *v.* Tel. Co., 319, 350.
Shields *v.* Blackburne, 33, 55.
Shields *v.* Tel. Co., 317.
Shiff *v.* R. Co., 156.
Shipper *v.* R. Co., 92.
Shoecraft *v.* Bailey, 74, 76, 80.
Shoemaker *v.* Hinze, 8.
Shoemaker *v.* Kingsbury, 266.
Shriver *v.* R. Co., 111, 134, 137, 337, 338.
Shuenfeldt *v.* Junkerman, 211.
Shular *v.* R. Co., 260.
Shultz *v.* R. Co., 297.
Sibley *v.* Aldrich, 76.
Sideways *v.* Todd, 48.
Sidonian, The, 163.
Siedenbach *v.* Riley, 51.
Siegrest *v.* Arnot, 85.
Silden *v.* Williams, 160.
Simes *v.* Zane, 344.
Simmons *v.* Brown, 344.
Simmons *v.* R. Co., 309.
Simmons *v.* Steamboat Co., 231.
Simms *v.* R. Co., 253.
Simon *v.* Fung Shuey, 137.
Simon *v.* Miller, 79.
Simons *v.* R. Co., 154, 156.
Simpson *v.* Hand, 166.
Simpson *v.* R. Co., 345.
Simpson *v.* Wrenn, 19, 22.
Sims *v.* Caufield, 51.
Sims *v.* Chance, 21.
Sinclair *v.* Pearson, 17.
Singleton *v.* Carroll, 13.
Singleton *v.* Hilliard, 139.
Singleton *v.* R. Co., 296.
Siordet *v.* Hall, 123, 125.
Sisson *v.* R. Co., 190, 345.
Sitgreaves *v.* Farmers' Bank, 62.
Six Hundred and Thirty Casks, 162, 338.
Skelley *v.* Kahn, 33.
Skinner *v.* Hall, 107.
Slater *v.* Meserau, 301.
Slater *v.* R. Co., 120.
Slaughter *v.* Green, 8.
Sleat *v.* Fagg, 133.
Slimmer *v.* Merry, 217.
Slingerland *v.* Morse, 22.
Slocum *v.* Fairchild, 139, 166.
Sloman *v.* R. Co., 271, 272, 278, 284.
Slosson *v.* R. Co., 341.
Small *v.* Robinson, 17.
Smallman *v.* Whilter, 222.

The References are to Sections.

Smedes *v.* Bank, 10.
Smiley *v.* Allen, 29.
Smith *v.* Atkins, 51, 56.
Smith *v.* Bank, 33.
Smith *v.* Brazelton, 129.
Smith *v.* British &c. Co., 232, 340.
Smith *v.* Coale, 62.
Smith *v.* Chamberlain, 265.
Smith *v.* Clark, 8.
Smith *v.* Cless, 17.
Smith *v.* Cook, 45.
Smith *v.* Findley, 189, 213.
Smith *v.* First Nat. Bk., 33, 332.
Smith *v.* Frost, 29, 40.
Smith *v.* Greenup, 26.
Smith *v.* Horne, 125, 136, 139.
Smith *v.* Hudson, 211.
Smith *v.* Keyes, 72, 74.
Smith *v.* Library Board, 13, 32.
Smith *v.* Meegan, 40, 43.
Smith *v.* Miller, 58.
Smith *v.* Mott, 51, 54.
Smith *v.* Pierce, 85.
Smith *v.* Read, 72, 76.
Smith *v.* R. Co., 5, 79, 80, 86, 111, 130, 137, 138, 139, 140, 142, 162, 201, 227, 232, 234, 240, 248, 261, 267, 270, 272, 295, 302, 338, 340, 341, 345, 347.
Smith *v.* Scott, 72.
Smith *v.* Seward, 84.
Smith *v.* Simms, 47.
Smith *v.* Shepherd, 166.
Smith *v.* Simmons, 301.
Smith *v.* Smith, 341.
Smith *v.* South. Ex. Co., 185.
Smith *v.* Stewart, 16.
Smith *v.* Strout, 59, 65.
Smith *v.* Tel. Co., 316, 319, 320, 349.
Smither *v.* R. Co., 158.
Smithurst *v.* Edmunds, 50, 51.
Smoot *v.* Weteunpka, 341.
Smyrl *v.* Niolon, 121, 122.
Smyth *v.* Craig, 51.
Snider *v.* Adams Ex. Co., 107, 137, 147, 149, 154.
Snider *v.* Geiss, 79.
Snow *v.* R. Co., 160, 230, 234, 302.
Sodowsky *v.* McFarland, 33.
Somers *v.* McLaughlin, 211.
Solomon *v.* Dawes, 209.
Solomon *v.* R. Co., 308.
Solomon *v.* Steam. Co., 201.
Sonoma Valley Bk. *v.* Hill, 59.
Soule *v.* Union Bank, 52, 58.
Soule *v.* White, 70.
Souter *v.* Baymore, 127.
Southard *v.* R. Co., 338.
Southcote *v.* Stanley, 230.
Southcote's Case, 136.
Southeastern R. Co. *v.* Thornton, 106.
Southern Australian Ins. Co. *v.* Randell, 22.
Southern Ex. Co. *v.* Armistead, 137, 139, 140, 201.
Southern Ex. Co. *v.* Caperton, 137, 140, 158.
Southern Ex. Co. *v.* Croft, 211.
Southern Ex. Co. *v.* Crook, 133, 137, 140, 155, 193, 195, 206.
Southern Ex. Co. *v.* Dickson, 160.
Southern Ex. Co. *v.* Everett, 201.
Southern Ex. Co. *v.* Glenn, 158.
Southern Ex. Co. *v.* Hess, 84, 104.
Southern Ex. Co. *v.* Hunnicutt, 158.
Southern Ex. Co. *v.* Kaufman, 134.
Southern Ex. Co. *v.* McVeigh, 105.
Southern Ex. Co. *v.* Moon, 138, 142, 162.
Southern Ex. Co. *v.* Newby, 84, 123, 137, 140, 143, 155, 160, 335, 338.
Southern Ex. Co. *v.* Purcell, 137.
Southern Ex. Co. *v.* Shea, 106.
Southern Ex. Co. *v.* Urquhart, 336.
Southern Ex. Co. *v.* Van Meter, 105, 206.
Southern Ex. Co. *v.* Womack, 137.
Southern R. Co. *v.* Heaton, 138.
Southern &c. R. Co. *v.* Henlein, 86, 135, 137, 142, 162, 338.
Southern &c. R. Co. *v.* Maddox, 142.
Southern &c. R. Co. *v.* Nix, 256.
Southern &c. R. Co. *v.* Kendrick, 253.
Southern &c. R. Co. *v.* Rhodes, 255, 257.
Southern &c. R. Co. *v.* Rice, 298.
Southern &c. R. Co. *v.* Schauffler, 308.
Southern &c. R. Co. *v.* Singleton, 225, 312.
Southern &c. R. Co. *v.* Wood, 111, 201.
Southwestern R. Co. *v.* Felder, 202.
Southwestern R. Co. *v.* Paulk, 308.
Southwestern R. Co. *v.* Thornton, 100.
Southwestern R. Co. *v.* Webb, 84.
Southwick *v.* Estes, 297.
Spangler *v.* Eicholtz, 43, 47.
Spears *v.* Hartley, 27.
Spears *v.* R. Co., 98.
Speed *v.* R. Co., 294, 301.
Spence *v.* Chadwick, 166.
Spencer *v.* Daggett, 84, 166.
Spencer *v.* Morgan, 16.
Spencer *v.* Pilcher, 16.
Spencer *v.* R. Co., 307, 341.
Speyer *v.* The Mary Belle Roberts, 337.
Spice *v.* Bacon, 80.
Spinetle *v.* Atlas Steam. Co., 174.
Spohn *v.* R. Co., 308.
Spooner *v.* Manchester, 21.
Spooner *v.* Mattoon, 33.
Spooner *v.* R. Co., 272, 306, 313.
Sprague *v.* R. Co., 137, 158, 202.
Sprague *v.* Smith, 293, 295, 296.
Sprague *v.* Tel. Co., 320, 349.
Spring *v.* Hager, 80.
Spring *v.* Haskell, 345.
Sproul *v.* Hemmingway, 300.
Sprowl *v.* Kellar, 84, 121, 124.
Spurrier *v.* R. Co., 341.
Squire *v.* R. Co., 102, 109, 137, 142, 159.
Squire *v.* Tel. Co., 321, 349.

The References are to Sections.

State *v.* Adams, 56.
State *v.* Bell Teleph. Co., 323.
State *v.* Bryant, 36.
State *v.* Campbell, 242, 256, 262.
State *v.* Carl, 211.
State *v.* Chamblyss, 72.
State *v.* Chovin, 255, 261.
State *v.* Goold, 261.
State *v.* Kinney, 257.
State *v.* Matthews, 72.
State *v.* Moore, 40.
State *v.* Nebraska Teleph. Co., 323.
State *v.* O'Neill, 211.
State *v.* Overton, 217, 241, 255, 261, 265, 268.
State *v.* Ross, 257, 267.
State *v.* R. Co., 89, 92, 228, 231, 234, 240, 246, 252, 253, 256, 295.
State *v.* Tel. Co. 323.
State *v.* Thompson, 262.
State Fire Ins. Co. *v.* Palmer, 63.
Stadhecker *v.* Combs, 84.
Stager *v.* R. Co., 308.
Stamdiffe, The, 135.
Stanard Milling Co. *v.* White Line Co., 186.
Standish *v.* R. Co., 262.
Standish *v.* Steamb. Co., 259, 262.
Stannard *v.* Prince, 49.
Stanton *v.* Bell, 33, 35.
Star of Hope, The, 166.
St. Clair *v.* R. Co., 204.
Steamboat Co. *v.* Bason, 121, 166.
Steam. Co. *v.* Brown, 115.
Stearns *v.* Marsh, 50, 52, 55, 61, 62, 69.
Stedman *v.* West. Trans. Co., 162.
Steele *v.* McTyer, 83.
Steele *v.* Taylor, 122.
Steele *v.* Townsend, 137, 148, 161, 162, 338.
Steelman *v.* Saylor, 213.
Steere *v.* Benson, 68.
Steers *v.* Liverpool Steam. Co., 109, 240, 339.
Steigel *v.* R. Co., 139.
Steinweg *v.* R. Co., 139, 148, 162, 236.
Steinman *v.* Wilkins, 27.
Stephen *v.* Smith, 257, 261.
Stephens *v.* Vaughan, 23.
Stephens &c. Trans. Co. *v.* Tuckerman, 123.
Stephenson *v.* Hart, 206.
Stetler *v.* R. Co., 291.
Stevens *v.* Dawson, 296.
Stevens *v.* Hurlburt Bank, 62.
Stevens *v.* R. Co., 40, 215, 340.
Stevens *v.* Woodward, 76.
Stevenson *v.* Price, 22.
Stevenson *v.* Pull. Pal. Car Co., 328.
Stevenson, The J. C., 338.
Stewart *v.* Bremer, 94.
Stewart *v.* Crowley, 134.
Stewart *v.* Davis, 16, 21, 55.
Stewart *v.* Head, 78.
Stewart *v.* Frazier, 22, 29.
Stewart *v.* Mer. Dis. Co., 196, 205.
Stewart *v.* R. Co., 42, 107, 162, 234, 298, 299.
Stiles *v.* Davis, 131, 230.
Stillings *v.* Gibson, 26.
Stillson *v.* R. Co., 314.
Stimson *v.* R. Co., 272, 273.
Stinson *v.* R. Co., 190, 192, 248, 271.
St. John *v.* O'Connell, 53.
St. John *v.* Ex. Co., 101, 103, 133, 180.
St. John *v.* Van Santvoord, 103, 107.
St. Joseph &c. R. Co. *v.* Hedge, 313.
St. Losky *v.* Davidson, 9, 13, 58.
St. Louis &c. Ins. Co. *v.* R. Co., 103, 107.
St. Louis Bk. *v.* Ross, 51.
St. Louis &c. R. Co. *v.* Berry, 278, 284.
St. Louis &c. R. Co. *v.* Bone, 169.
St. Louis &c. R. Co. *v.* Cantrell, 234, 254, 312.
St. Louis &c. R. Co. *v.* Cleary, 137, 148, 160.
St. Louis &c. R. Co. *v.* Dalby, 261, 297.
St. Louis &c. R. Co. *v.* Dorman, 86.
St. Louis &c. R. Co. *v.* Finley, 269.
St. Louis &c. R. Co. *v.* Flanagan, 26, 224.
St. Louis &c. R. Co. *v.* Freeman, 347.
St. Louis &c. R. Co. *v.* Hadly, 265.
St. Louis &c. R. Co. *v.* Heath, 204.
St. Louis &c. R. Co. *v.* Hill, 92.
St. Louis &c. R. Co. *v.* Knight, 182.
St. Louis &c. R. Co. *v.* Larned, 101.
St. Louis &c. R. Co. *v.* Leigh, 251.
St. Louis &c. R. Co. *v.* Lesser, 86, 137, 142, 335, 337.
St. Louis &c. R. Co. *v.* Miller, 296.
St. Louis &c. R. Co. *v.* Montgomery, 112.
St. Louis &c. R. Co. *v.* Murray, 308.
St. Louis &c. R. Co. *v.* Myrtle, 266.
St. Louis &c. R. Co. *v.* Phelps, 345.
St. Louis &c. R. Co. *v.* Piper, 101, 103, 137.
St. Louis &c. R. Co. *v.* Rice, 304.
St. Louis &c. R. Co. *v.* Smuck, 137, 162, 173.
St. Louis &c. R. Co. *v.* South, 261.
St. Louis &c. R. Co. *v.* Velarms, 232.
St. Louis &c. R. Co. *v.* Weakly, 107, 108, 142, 147, 338.
St. Paul *v.* Seitz, 301.
St. Paul &c. R. Co. *v.* R. Co., 42.
Stockton *v.* Frey, 231, 340.
Stockton *v.* Neil, 340.
Stoddard *v.* Kimball, 58.
Stoddard *v.* R. Co., 162.
Stokes *v.* Frazier, 62, 63.
Stokes *v.* Saltonstall, 218, 340.
Stokes *v.* R. Co., 232.
Stone *v.* Brown, 57.
Stone *v.* Farmers' &c. Co., 88.
Stone *v.* Hills, 297.
Stone *v.* R. Co., 241, 242, 256.
Stone *v.* Waitt, 200.
Stone *v.* Wyatt, 112.
Stoneman *v.* R. Co., 271, 278.
Storer *v.* Gowen, 11, 33.
Storr *v.* Crowley, 201.
Storrs *v.* Utica, 301.

The References are to Sections.

Stover *v.* R. Co., 309.
Stowe *v.* R. Co., 202.
Strause *v.* Tel. Co., 317.
Strahorn *v.* Union Stock Co., 27, 205.
Strickland *v.* Turner, 51.
Strohm *v.* R. Co., 317.
Strohn *v.* R. Co., 115, 148, 152, 154, 156, 204.
Strong *v.* National Bk. Assn., 52, 62.
Strong *v.* R. Co., 160.
Strouss *v.* R. Co., 278, 284.
Stuart *v.* Bigler, 61.
Stuart *v.* British &c. Steam. Co., 181.
Stuart *v.* Tel. Co., 350.
Sturdivant *v.* R. Co., 307.
Sturgess *v.* The Columbus, 176.
Sturgeon *v.* R. Co., 137, 162.
Sue, The, 265.
Sullivan *v.* R. Co., 231, 267, 340.
Sullivan *v.* Thompson, 101, 102, 201.
Sulsbacker *v.* Dickie, 301.
Sultana, The, *v.* Chapman, 148, 201.
Summers *v.* R. Co., 307.
Summitt *v.* State, 264.
Sumner *v.* Hamlet, 51.
Sumner *v.* R. Co., 119.
Sumner *v.* Walker, 106, 110.
Sunbolf *v.* Alford, 259.
Sunday *v.* Gordon, 250, 253.
Sunderland *v.* Westcott, 139, 338.
Sun Mut. Ins. Co. *v.* Miss. Val. Tran. Co., 166.
Sutherland *v.* Ingalls, 76.
Sutherland *v.* R. Co., 266.
Sutherland *v.* Westcott, 150.
Sutro *v.* Fargo, 338.
Sutton *v.* R. Co., 213, 230.
Swamson *v.* R. Co., 230.
Swan *v.* Bournes, 82.
Swan *v.* R. Co., 261.
Swann *v.* Brown, 45, 46.
Swartz *v.* Houser, 31.
Swasey *v.* R. Co., 56.
Sweet *v.* Barney, 84, 207.
Sweet *v.* Brown, 54.
Sweetland *v.* Tel. Co., 319, 320, 342.
Swift *v.* Moseley, 15, 17.
Swift *v.* Pac. Mail S. S. Co., 100, 156.
Swigert *v.* Graham, 42.
Swindler *v.* Hilliard, 84, 139, 161, 169, 337, 338.
Swire *v.* Leach, 68.
Switzerland Marine Ins. Co. *v.* Louisville &c. R. Co., 273.

T.

Taber *v.* R. Co., 254.
Taft *v.* Church, 62.
Taft *v.* Tiede, 344.
Talby *v.* R. Co., 310.
Talty *v.* Freedman's Sav. Inst., 52.
Tancil *v.* Seaton, 15, 33.
Tarbell *v.* R. Co., 218, 219, 224.
Tarbell *v.* Royal Ex. Co., 201.
Tardos *v.* R. Co., 102, 137.
Tattersall *v.* Nat. St. Co., 139.
Tatum *v.* Sharpless, 15.
Taussig *v.* Shields, 40.
Taylor *v.* Cheever, 59.
Taylor *v.* Collier, 345.
Taylor *v.* Downey, 72, 76.
Taylor *v.* Liverpool &c. Steam. Co., 180.
Taylor *v.* Monnot, 72, 79.
Taylor *v.* R. Co., 101, 108, 109, 137, 148, 157, 164, 231, 235, 244, 294, 341.
Taylor *v.* Secrist, 47.
Taylor *v.* Wells, 214.
Teall *v.* Felton, 330.
Tegler *v.* Shipman, 211.
Tenn. &c. R. Co. *v.* Nelson, 137.
Telegraph Co. *v.* Griswold, 319, 342.
Telegraph Co. *v.* Taylor, 319, 349.
Tennery *v.* Pippinger, 340.
Tennessee &c. R. Co. *v.* Johnston, 137.
Terre Haute &c. R. Co. *v.* Buck, 254.
Terre Haute &c. R. Co. *v.* Jackson, 298.
Terre Haute &c. R. Co. *v.* Vanatta, 257, 347.
Terry *v.* Jewett, 234.
Terry *v.* R. Co., 241, 268.
Teutonia Nat. Bk. *v.* Loeb, 53.
Texas Ex. Co. *v.* Scott, 137.
Texas &c. R. Co. *v.* Alexander, 253.
Texas &c. R. Co. *v.* Best, 230.
Texas &c. R. Co. *v.* Black, 266.
Texas &c. R. Co. *v.* Bond, 256.
Texas &c. R. Co. *v.* Caldwell, 142.
Texas &c. R. Co. *v.* Capps, 272, 278, 284.
Texas &c. R. Co. *v.* Cornelius, 297.
Texas &c. R. Co. *v.* Davis, 137.
Texas &c. R. Co. *v.* Dupree, 137.
Texas &c. R. Co. *v.* Hamm, 137, 158.
Texas &c. R. Co. *v.* Jackson, 158.
Texas &c. R. Co. *v.* McGilvary, 308.
Texas &c. R. Co. *v.* Morris, 158.
Texas &c. R. Co. *v.* Murphy, 308, 341.
Texas &c. R. Co. *v.* Nicholson, 345.
Texas &c. R. Co. *v.* Parrish, 103.
Texas R. Co. *v.* Rogers, 101.
Texas &c. R. Co. *v.* Scrivener, 100, 148, 158.
Texas &c. R. Co. *v.* Volk, 341.
Texas &c. R. Co. *v.* Youngblood, 158.
Thatcher *v.* Harlan, 26.
Thayer *v.* Dwight, 70.
Thayer *v.* Hutchinson, 15.
Thayer *v.* R. Co., 137, 139, 231.
Thickston *v.* Howard, 76.
Third Nat. Bk. *v.* Boyd, 55, 58.
Thirteenth St. R. Co. *v.* Boudrian, 306.
Thomas *v.* R. Co., 119, 137, 201, 204, 266, 291, 293, 294.
Thomas *v.* The Morning Glory, 172, 338.
Thomas &c. Mfg. Co. *v.* R. Co., 345.
Thompson *v.* Dolliver, 70.
Thompson *v.* Duncan, 341.
Thompson *v.* Fargo, 211.
Thompson *v.* Harlow, 42.
Thompson *v.* Lacy, 72, 73, 327.
Thompson *v.* Toland, 52, 57.
Thompson *v.* Patrick, 70.

The References are to Sections.

Thompson *v.* R. Co., 158, 211, 250, 253 341.
Thompson *v.* Tel. Co., 320, 350.
Thompson *v.* Scott, 295.
Thompson *v.* Ward, 327.
Thorne *v.* Deas, 10.
Thorogood *v.* Bryan, 315.
Thorogood *v.* Marsh, 122.
Thorpe *v.* R. Co., 251, 293, 298.
Thrall *v.* Lathrop, 54.
Three Hundred & Eighteen Tons of Coal, 90.
Thrift *v.* Youle, 172.
Thuman *v.* R. Co., 295.
Thurman *v.* Wells, 88.
Thurston *v.* R. Co., 223, 224, 267.
Tibbetts *v.* Flanders, 51.
Tibby *v.* R. Co., 137, 245, 247.
Tierney *v.* R. Co., 170.
Tindall *v.* Taylor, 211.
Titania, The, 164, 166.
Titsworth *v.* Winnegar, 47.
Tobin *v.* R. Co., 230, 234.
Todd *v.* Figley, 38.
Todd *v.* R. Co., 225, 246, 307.
Toledo &c. R. Co. *v.* Baddeley, 253, 267.
Toledo &c. R. Co. *v.* Beggs, 225, 232, 340.
Toledo &c. R. Co. *v.* Bevin, 341.
Toledo &c. R. Co. *v.* Brannagan, 341.
Toledo &c. R. Co. *v.* Brooks, 225, 266.
Toledo &c. R. Co. *v.* Grush, 234.
Toledo R. Co. *v.* Hammond, 272.
Toledo &c. R. Co. *v.* Harmon, 297.
Toledo &c. R. Co. *v.* Lockhart, 100.
Toledo &c. R. Co. *v.* McDonough, 244.
Toledo &c. R. Co. *v.* Maine, 234.
Toledo &c. R. Co. *v.* Merriam, 103.
Toledo &c. R. Co. *v.* Patterson, 266.
Toledo &c. R. Co. *v.* Wright, 257, 261.
Tolman *v.* R. Co., 341.
Tombler *v.* Koelling, 22.
Tommy, The, 164.
Tompkins *v.* Saltmarsh, 33.
Tooker *v.* Gormer, 185, 205.
Torpey *v.* R. Co., 225.
Torpey *v.* Williams, 272.
Torrey *v.* Harris, 57.
Tousey *v.* Roberts, 329.
Towanda Coal Co. *v.* Heeman, 297.
Tower *v.* R. Co., 112, 135, 289, 310.
Towle *v.* Raymond, 27.
Townsend *v.* Newell, 27.
Townsend *v.* R. Co., 244, 258.
Towson *v.* Havre de Grace Bank, 74, 76.
Tracy *v.* Pull. Pal. Car Co., 325.
Tracy *v.* Wood, 33.
Transportation Co. *v.* Downer, 166, 338, 340.
Travers *v.* R. Co., 298.
Travis *v.* Thompson, 215.
Treadwell *v.* Davis, 68, 70.
Treadwell *v.* Whittier, 329.
Treiber *v.* Burrows, 79.
Trent Nav. Co. *v.* Wood, 84, 123.
Trigg *v.* R. Co., 346.
Trottinger *v.* R. Co., 241.
Trowbridge *v.* Chapin, 115.
Trowbridge *v.* Schreiver, 14.
Troy &c. R. Co. *v.* Kerr, 296.
True *v.* Tel. Co., 319, 320, 349.
Truex *v.* R. Co., 307.
Trust *v.* Pirsson, 7, 26.
Trustees *v.* Brighton Stock Yards, 26.
Tucker *v.* Chaplin, 304.
Tucker *v.* R. Co., 204.
Tucker *v.* Wilson, 62.
Tuckerman *v.* Stephens &c. Trans. Co., 166.
Tudor *v.* Lewis, 33.
Tuelly *v.* Thomas, 12.
Tunnell *v.* Pettijohn, 95.
Tunney *v.* R. Co., 226.
Turner *v.* Huff, 201.
Turner *v.* R. Co., 115, 234, 295, 348.
Turner *v.* Tel. Co., 321, 342, 349.
Turner *v.* The Black Warrior, 338.
Turney *v.* Wilson, 83, 166, 338.
Turranture *v.* R. Co., 47.
Turrell *v.* Crawley, 215.
Tuttle *v.* R. Co., 347.
Twomley *v.* R. Co., 308.
Tygert *v.* The Sinneckson, 337.
Tyler *v.* Alfred, 330.
Tyler *v.* Tel. Co., 316, 319, 342, 349, 351.
Tyly *v.* Morrice, 133, 142.
Tyrrell *v.* R. Co., 233.
Tysen *v.* Moore, 166, 338.

U.

Ullman *v.* State, 327.
Ulmer *v.* Ulmer, 16.
Ulrich *v.* R. Co., 247, 248.
Umlauf *v.* Bassett, 45.
Union Bank *v.* Laird, 53.
Union Bank *v.* Roberts, 68.
Union Ex. Co. *v.* Graham, 96, 137, 338.
Union Ex. Co. *v.* Shoop, 102.
Union Mut. Ins. Co. *v.* R. Co., 140, 162, 166.
Union &c. R. Co. *v.* Hand, 233, 347.
Union &c. R. Co. *v.* Hause, 301.
Union &c. R. Co. *v.* Hurt, 102.
Union &c. R. Co. *v.* Kallaher, 293.
Union &c. R. Co. *v.* Nichols, 225.
Union &c. R. Co. *v.* Riegel, 205.
Union Steam. Co. *v.* Knapp, 202.
Union Trust Co. *v.* Rigdon, 58.
U. S. *v.* Behan, 344.
U. S. *v.* Hooe, 55.
U. S. *v.* Neal, 55.
U. S. *v.* Power, 85, 161.
U. S. *v.* Yukers, 332.
U. S. Ex. Co. *v.* Bachman, 137, 142, 338.
U. S. Ex. Co. *v.* Buchanan, 84.
U. S. Ex. Co. *v.* Haines, 101, 106, 108.
U. S. Ex. Co. *v.* Harris, 137, 158.
U. S. Ex. Co. *v.* Keefer, 185.
U. S. Ex. Co. *v.* Root, 205.
U. S. Ex. Co. *v.* Rush, 101.
U. S. Tel. Co. *v.* Gildersleeve, 317, 319, 342, 349.

The References are to Sections.

U. S. Tel. Co. *v.* Tel. Co., 316.
U. S. Tel. Co. *v.* Wenger, 349.

V.

Vail *v.* R. Co., 120.
Van Balaam *v.* Dean, 212.
Van Blarcom *v.* Broadway Bank, 53, 57.
Van Buskirk *v.* Purinton, 215.
Van Buskirk *v.* Roberts, 291.
Vance *v.* Throckmorton, 72, 74, 76, 81
Vanderbilt *v.* Turnpike Co., 297.
Van Hern *v.* Taylor, 166.
Van Horn *v.* Kermit, 272, 286, 287, 289.
Vankirk *v.* R. Co., 241, 260.
Van Ostran *v.* R. Co., 234.
Van Santvoord *v.* St. John, 95.
Van Schaak *v.* North. Trans. Co., 338
Van Syckel *v.* The Ewing, 166.
Van Winkle *v.* Adams Ex. Co., 155.
Van Winkle *v.* U. S. Mail Co., 131.
Van Wycks *v.* Howard, 79, 81.
Varble *v.* Bigley, 49, 85.
Vaughan *v.* 630 Casks, 162, 170.
Vaughan *v.* Watt, 60.
Vaughan *v.* Webster, 13, 22.
Vedder *v.* Fellows, 255, 262.
Velsian *v.* Lewis, 17.
Venner, The, 182.
Verner *v.* Sweitzer, 83, 84, 139, 154, 240, 335, 337.
Vernon *v.* DeWolf, 55.
Verrall *v.* Robinson, 131.
Vick *v.* R. Co., 226.
Vicksburg *v.* Hennessy, 341.
Vicksburg Co. *v.* U. S. Ex. Co., 96.
Victor *v.* R. Co., 308.
Vigo Agricultural Soc. *v.* Brumfiel, 13, 32.
Vincent *v.* Cornell, 21.
Vincent *v.* Rather, 13, 40, 47.
Vincento T., The, 338.
Vincenzo T. The, 182.
Vinio *v.* Steam. Co., 206, 223.
Vinton *v.* R. Co., 267.
Virginia &c. R. Co. *v.* Sanger, 233, 301.
Virginia &c. R. Co. *v.* Sayers, 137.
Virginia, The, *v.* Kraft, 215.
Vivid, The. 338.
Volunteer, The, 215.
Vose *v.* R. Co., 230.

W.

Wabash Canal Co. *v.* Mayer, 341.
Wabash &c. R. Co. *v.* Black, 158.
Wabash &c. R. Co. *v.* Brown, 139, 158
Wabash &c. R. Co. *v.* Jaggerman, 101, 106, 162.
Wabash &c. R. Co. *v.* McCausland, 86, 139.
Wabash &c. R. Co. *v.* Peyton, 291.
Wabash &c. R. Co. *v.* Pratt, 135, 162.
Wabash &c. R. Co. *v.* Rector, 227. 298.
Wabash &c. R. Co. *v.* Savage, 299.
Wabash &c. R. Co. *v.* Wallace, 304.
Wade *v.* Leroy, 347.
Wade *v.* Thayer, 75.
Wade *v.* Wheeler, 112.
Wadsworth *v.* Alcott, 44.
Wadsworth *v.* Tel. Co., 318, 350.
Wadsworth *v.* Thompson, 62.
Wagner *v.* R. Co., 266.
Wahl *v.* Holt, 101, 104.
Waite *v.* Gilbert, 345.
Wakefield *v.* R. Co., 242.
Wakeman *v.* Gowdy, 58.
Walcott *v.* Keith, 51.
Waldron *v.* R. Co., 278.
Walker *v.* British Guarantee Assn., 40, 44.
Walker *v.* Jackson, 143.
Walker *v.* R. Co., 225, 241.
Walker *v.* Skipwith, 83, 84, 137, 140.
Walker *v.* Staples, 51, 70.
Walker *v.* R. Co., 340, 347.
Walker *v.* Tel. Co., 319.
Walker *v.* Wilkinson, 17.
Wall *v.* Livezay, 340.
Wallace *v.* Ah Sam, 344.
Wallace *v.* Canady, 39.
Wallace *v.* Clayton, 120.
Wallace *v.* Long, 167.
Wallace *v.* Matthews, 90, 137, 140.
Wallace *v.* Saunders. 137, 140, 162.
Wallace *v.* R. Co., 266.
Wallace *v.* Vigus, 120, 345.
Waller *v.* Parker, 40.
Walling *v.* Potter, 72, 74, 327.
Walpole *v.* Bridges, 121.
Wallingford *v.* R. Co., 139.
Walsh *v.* Porterfield, 76, 80.
Walsh *v.* R. Co., 220, 223, 250, 346.
Walsh *v.* The Wright, 272, 289.
Walston *v.* Myers, 85.
Walter *v.* Smith, 60.
Walton *v.* R. Co., 297.
Wann *v.* Tel. Co., 316, 317, 319, 320.
Warburton *v.* R. Co., 230.
Ward *v.* R. Co., 306, 345.
Ward *v.* Vanderbilt, 250, 291.
Ward *v.* Ward, 70.
Warden *v.* Greer, 84, 130, 152.
Wardle *v.* R. Co., 269.
Ware *v.* Canal Co., 297.
Ware *v.* Gay, 340.
Warner *v.* Dunnavan, 16.
Warner *v.* R. Co., 270, 280, 287, 286, 340.
Warner *v.* West. Trans. Co., 272.
Warren *v.* R. Co., 227, 231, 304, 312, 323.
Washburn *v.* Jones, 76.
Washburn *v.* Pond, 62.
Washburn *v.* R. Co., 225, 266, 312.
Washington *v.* R. Co., 100, 292.
Washington &c. Tel. Co. *v.* Hobson, 317, 349.
Waterbury *v.* R. Co., 225, 246, 306, 312.
Water Co. *v.* Brown, 62.
Water Co. *v.* Ware, 301.
Waterman *v.* Brown, 60.

The References are to Sections.

Wathan, The, 166.
Watkins *v.* R. Co., 230.
Watkins *v.* Roberts, 38, 42.
Watkinson *v.* Laughton, 129.
Watson *v.* Cross, 73.
Watson *v.* Duykinck, 250.
Watson *v.* R. Co., 247, 312.
Watts *v.* Canal Co., 84.
Way *v.* Davidson, 68, 70.
Way *v.* R. Co., 341.
Wayland *v.* Moseby, 160, 213.
Wayne *v.* Turnpike Co., 341.
Weaver *v.* R. Co., 244.
Webster *v.* R. Co., 315.
Weed *v.* Barney, 201, 207.
Weed *v.* R. Co., 103, 272, 291, 292, 298.
Weeks *v.* R. Co., 272, 289, 302.
Wehmann *v.* R. Co., 157.
Weil *v.* Merchants' Trans. Co., 107.
Weil *v.* R. Co., 306.
Weiller *v.* R. Co., 142.
Weinberg *v.* R. Co., 101.
Weir *v.* Ex. Co., 158.
Weir Plow Co. *v.* Porter, 5.
Weisinger *v.* Taylor, 76, 80.
Weiss *v.* R. Co., 341.
Welch *v.* Mandeville, 51.
Welch *v.* Pull. Pal. Car Co., 325.
Welch *v.* R. Co., 130, 137.
Weller *v.* R. Co., 254.
Wells *v.* Archer, 52.
Wells *v.* R. Co., 114, 139, 248, 268.
Wells *v.* Steam. Nav. Co., 83, 85, 137, 160, 162.
Wells *v.* Thomas, 215.
Wells *v.* Wells, 58.
Wellsborough &c. Co. *v.* Griffin, 296.
Welsh *v.* R. Co., 86, 123, 137, 139.
Wendle *v.* Jordan, 24.
Wentworth *v.* McDuffee, 16, 21, 42.
Wentworth *v.* The Realm, 182.
Wentz *v.* R. Co., 242.
Wernwag *v.* R. Co., 206.
Wertheimer *v.* R. Co., 148, 188, 338.
West *v.* Blackshaer, 42.
West *v.* Carolina Ins. Co., 52, 59.
West *v.* Murphy, 29.
West *v.* The Berlin, 120, 166, 170.
West *v.* The Uncle Sam, 250.
West *v.* R. Co., 301.
West *v.* Tel. Co., 318, 349, 351.
Westchester R. Co. *v.* Miles, 218, 223, 265.
Westcott *v.* Fargo, 139, 142, 149, 162.
Westcott *v.* Thompson, 8.
Westcott *v.* Tilton, 8.
Weston *v.* R. Co., 234, 345.
Westphal *v.* Ludlow, 58.
West Phila. Pass. Co. *v.* Whipple, 307.
West. &c. R. Co. *v.* Brown, 296.
West. &c. R. Co. *v.* Camp, 201.
West. &c. R. Co. *v.* Ex. Cotton Mills, 132, 135.
West. &c. R. Co. *v.* Kelly, 211.
West. &c. R. Co. *v.* Little, 195.
West. &c. R. Co. *v.* McElwee, 106.
West. &c. R. Co. *v.* Stanley, 308.
West. &c. R. Co. *v.* Turner, 298.
West. Trans. Co. *v.* Barber, 209.
West. Trans. Co. *v.* Hawley, 201.
West. Trans. Co. *v.* Hosking, 140, 149.
West. Trans. Co. *v.* Marshall, 57.
West. Trans. Co. *v.* Newhall, 104, 137, 139, 140, 142, 146, 154, 335.
West. U. Tel. Co. *v.* Adams, 319, 320, 350.
West. U. Tel. Co. *v.* Allen, 318.
West. U. Tel. Co. *v.* Barrow, 320.
West. U. Tel. Co. *v.* Bartlett, 316.
West. U. Tel. Co. *v.* Berdine, 350.
West. U. Tel. Co. *v.* Beringer, 350.
West. U. Tel. Co. *v.* Blanchard, 320, 349.
West. U. Tel. Co. *v.* Broesche, 320, 350.
West. U. Tel. Co. *v.* Brown, 349, 350.
West. U. Tel. Co. *v.* Buchanan, 317, 319, 320, 349.
West. U. Tel. Co. *v.* Call Pub. Co., 316.
West. U. Tel. Co. *v.* Carur, 316, 317, 318, 319, 321, 342.
West. U. Tel. Co. *v.* Carter, 350.
West. U. Tel. Co. *v.* Clark, 317, 350.
West. U. Tel. Co. *v.* Cobbs, 320.
West. U. Tel. Co. *v.* Coffin, 350.
West. U. Tel. Co. *v.* Cohen, 317.
West. U. Tel. Co. *v.* Cook, 317.
West. U. Tel. Co. *v.* Cooledge, 320.
West. U. Tel. Co. *v.* Cooper, 317, 350.
West. U. Tel. Co. *v.* Crall, 319, 342, 349.
West. U. Tel. Co. *v.* Cunningham, 350.
West. U. Tel. Co. *v.* Dejarles, 350.
West. U. Tel. Co. *v.* Dubois, 318, 349.
West. U. Tel. Co. *v.* Dunfield, 319, 320.
West. U. Tel. Co. *v.* Edsall, 349.
West. U. Tel. Co. *v.* Erwin, 350.
West. U. Tel. Co. *v.* Evans, 350.
West. U. Tel. Co. *v.* Fatman, 317, 349.
West. U. Tel. Co. *v.* Feigles, 350.
West. U. Tel. Co. *v.* Fenton, 318, 319, 320, 349.
West. U. Tel. Co. *v.* Ferguson, 316, 320.
West. U. Tel. Co. *v.* Fontaine, 317, 319.
West. U. Tel. Co. *v.* Fore, 350.
West. U. Tel. Co. *v.* Foster, 322.
West. U. Tel. Co. *v.* Graham, 137, 319, 320, 349.
West. U. Tel. Co. *v.* Hall, 349.
West. U. Tel. Co. *v.* Harris, 320, 349.
West. U. Tel. Co. *v.* Henderson, 320, 350.
West. U. Tel. Co. *v.* Hill, 350.
West. U. Tel. Co. *v.* Hope, 318.
West. U. Tel. Co. *v.* Howell, 342.
West. U. Tel. Co. *v.* Hyer, 349.
West. U. Tel. Co. *v.* Jobe, 350.
West. U. Tel. Co. *v.* Jones, 320, 350.
West. U. Tel. Co. *v.* Kemp, 320.

The References are to Sections.

West. U. Tel. Co. *v.* Kendzora, 350
West. U. Tel. Co. *v.* Kinsley, 350.
West. U. Tel. Co. *v.* Linn, 317, 350
West. U. Tel. Co. *v.* Longwill, 318, 349.
West. U. Tel. Co. *v.* Lydon, 350.
West. U. Tel. Co. *v.* Martin, 349.
West. U. Tel. Co. *v.* May, 350.
West. U. Tel. Co. *v.* McDaniel, 322
West. U. Tel. Co. *v.* McGuire, 320.
West. U. Tel. Co. *v.* McKibben, 318, 319, 349
West. U. Tel. Co. *v.* McLeod, 350.
West. U. Tel. Co. *v.* McMillan, 319, 350.
West. U. Tel. Co. *v.* Meek, 320, 342.
West. U. Tel. Co. *v.* Meredith, 320.
West. U. Tel. Co. *v.* Meyer, 317.
West. U. Tel. Co. *v.* Moore, 320.
West. U. Tel. Co. *v.* Munford, 317, 321.
West. U. Tel. Co. *v.* Nations, 350.
West. U. Tel. Co. *v.* O'Keefe, 319, 350.
West. U. Tel. Co. *v.* Pendleton, 318.
West. U. Tel. Co. *v.* Phillips, 320.
West. U. Tel. Co. *v.* Piner, 350.
West. U. Tel. Co. *v.* Porter, 350.
West. U. Tel. Co. *v.* Proctor, 350.
West. U. Tel. Co. *v.* Rains, 320.
West. U. Tel. Co. *v.* Reynolds, 349.
West. U. Tel. Co. *v.* Richman, 318, 319.
West. U. Tel. Co. *v.* Rogers, 351.
West. U. Tel. Co. *v.* Rosentreter, 350.
West. U. Tel. Co. *v.* Russell, 350.
West. U. Tel. Co. *v.* Saunders, 351.
West. U. Tel. Co. *v.* Scircle, 342.
West. U. Tel. Co. *v.* Sheffield, 349.
West. U. Tel. Co. *v.* Short, 319, 320.
West. U. Tel. Co. *v.* Shotter, 320, 349.
West. U. Tel. Co. *v.* Simpson, 350.
West. U. Tel. Co. *v.* Smith, 322.
West. U. Tel. Co. *v.* Stephens, 350.
West. U. Tel. Co. *v.* Stratemeier, 350.
West. U. Tel. Co. *v.* Terrell, 317.
West. U. Tel. Co. *v.* Thompson, 317.
West. U. Tel. Co. *v.* Trissal, 317.
West. U. Tel. Co. *v.* Tyler, 319, 320.
West. U. Tel. Co. *v.* Valentine, 349.
West. U. Tel. Co. *v.* Ward, 316, 317.
West. U. Tel. Co. *v.* Way, 319, 320, 349.
West. U. Tel. Co. *v.* Wilson, 349.
West. U. Tel. Co. *v.* Wingate, 350.
West. U. Tel. Co. *v.* Wisdom, 350.
West. U. Tel. Co. *v.* Womack, 350.
West. U. Tel. Co. *v.* Wood, 351.
West. U. Tel. Co. *v.* Young, 317, 320.
West. U. Tel. Co. *v.* Zane, 350.
Wetzell *v.* Dinsmore, 184.
Wetzler *v.* Collins, 160.
Weyland *v.* Elkins, 103.
Whalen *v.* R. Co., 234, 269, 347.
Whalley *v.* Wray, 83.
Wheeler *v.* Newbould, 62, 66.
Wheeler *v.* North. Col. Irrigation Co., 84.
Wheeler *v.* R. Co., 89, 100, 160, 218, 220.
Wheeler &c. Co *v.* Heil, 8.
Wheelock *v.* Wheelwright, 21.
Wheelwright *v.* R. Co., 341.
Whelan *v.* Kinsley, 60.
Whitaker *v.* Sumner, 51, 57, 70.
Whitbeck *v.* Schuyler, 115.
White *v.* Ashton, 160.
White *v.* Bascom, 15, 49, 212.
White *v.* Boulton, 231.
White *v.* Humphrey, 32.
White *v.* Phelps, 52, 58.
White *v.* Platt, 70.
White *v.* Railway, 66.
White *v.* R. Co., 24, 47, 115, 232, 261, 291, 341.
White *v.* Smith, 26, 27.
White *v.* Tel. Co., 319.
White *v.* The Mary Ann, 85.
White *v.* Vann, 213, 215.
White *v.* Van Kirt, 160.
White *v.* Wimisimmet, 84.
White Mountain R. Co. *v.* Bay State Iron Co., 52, 69.
White Mountain R. Co. *v.* Bay State Iron Co., 69, 69.
Whitehead *v.* R. Co., 137, 148.
Whitehead *v.* Vanderbilt, 38.
Whitemore *v.* Haroldson, 78, 328.
Whitesides *v.* Russell, 166, 176, 338.
Whitesides *v.* Thurkill, 137, 166.
Whitfield *v.* Lord LeDespencer, 330.
Whitlock *v.* Heard, 17.
Whitmore *v.* Bowman, 84, 137.
Whitmore *v.* Conline, 272.
Whitney *v.* Ins. Co., 213.
Whitney *v.* Lee, 10, 33.
Whitney *v.* Peay, 57.
Whitney *v.* Pull. Pal. Car Co., 311.
Whitney *v.* R. Co., 201, 296.
Whitney *v.* Tibbetts, 51.
Whittaker *v.* Charleston Gas Co., 66.
Whitten *v.* Wright, 58.
Whittin *v.* Paul, 58.
Whitwell *v.* Brigham, 59.
Whitworth *v.* R. Co., 108, 338.
Wichita Bk. *v.* R. Co., 160.
Wiggins *v.* Hathaway, 330.
Wiggins Ferry Co. *v.* R. Co., 103.
Wiggins *v.* R. Co., 157.
Wightman *v.* R. Co., 263.
Wilby *v.* R. Co., 106.
Wilcox *v.* Fairhaven Bank, 55.
Wilcox *v.* Parmlee, 127.
Wilcox *v.* The Philadelphia, 289.
Wilde *v.* Merchants' Trans. Co., 156.
Wilder *v.* R. Co., 89.
Wilds *v.* R. Co., 341.
Wiles Laundering Co. *v.* Hahlo, 26.
Wilkie *v.* Day, 51.
Wilkie *v.* Bolster, 340.
Wilkins *v.* Earle, 79, 81, 272.
Wilkinson *v.* Fainle, 230.
Wilkinson *v.* Verity, 29.
Willard *v.* Bridge, 22.
Willcocks, ex parte, 56.
Willets *v.* R. Co., 260, 262, 269, 314.

The References are to Sections.

William, The, 14.
Williams *v.* Bronson, 84, 140, 142, 166.
Williams *v.* Car Co., 298.
Williams *v.* Earle, 76.
Williams *v.* Grant, 121, 125.
Williams *v.* Holland, 40, 207.
Williams *v.* Jones, 7.
Williams *v.* Keokuk Co., 289.
Williams *v.* Vanderbilt, 124, 250, 291, 346.
Williamson *v.* Culpepper, 52.
Williard *v.* Reinhardt, 72, 327.
Willis *v.* R. Co., 137, 251, 306.
Willitt *v.* Rich, 332.
Willmer *v.* Morrell, 22.
Willoughby *v.* Comstock, 62.
Wilmington &c. R. Co. *v.* Greenville &c. R. Co., 110.
Wilson *v.* Adams Ex. Co., 206.
Wilson *v.* Anderton, 209.
Wilson *v.* Brett, 11, 35.
Wilson *v.* Chesapeake, 271.
Wilson *v.* Culver, 65.
Wilson *v.* Finney, 8.
Wilson *v.* Hamilton, 86.
Wilson *v.* Halpin, 81.
Wilson *v.* Little, 51, 52, 62, 69.
Wilson *v.* Martin, 15, 27.
Wilson *v.* R. Co., 22, 47, 103, 137, 139, 162, 215, 240, 270, 279, 280, 291, 292, 308, 311, 328, 345, 348.
Wilson *v.* White, 301.
Winton *v.* R. Co., 225, 266.
Winbourn's Case, 295.
Wing *v.* R. Co., 124.
Winkfield *v.* Packington, 115, 155.
Winkley *v.* Foye, 20, 22, 29.
Winn *v.* R. Co., 337.
Winnegar *v.* R. Co., 299.
Winona &c. R. Co. *v.* Blake, 88.
Winship *v.* Neale, 15.
Winslow *v.* R. Co., 202, 206.
Winston *v.* Taylor, 45.
Wintermute *v.* Clark, 72, 327.
Winters *v.* R. Co., 307, 314.
Wintringham *v.* Hayes, 332.
Wisconsin Tel. Co. *v.* Oskosh, 323.
Wiser *v.* Chesley, 33, 72, 332, 333.
Wisner *v.* Barber, 344.
Witbeck *v.* Holland, 101, 201.
Witowski *v.* Brennan, 5, 44.
Witting *v.* R. Co., 338.
Witzler *v.* Collins, 170.
Wolcott *v.* Keith, 70.
Wolf *v.* Ex. Co., 123, 334.
Wolf *v.* R. Co., 162, 291.
Wolf *v.* Tel. Co., 319, 320.
Wolf *v.* The Vanderland, 162.
Wolfe *v.* Myers, 160.
Wolfskihl *v.* Tel. Co., 318.
Womack *v.* Tel. Co., 319, 320.
Wood *v.* Cobb, 300.
Wood *v.* Crocker, 201, 202.
Wood *v.* McClure, 38.
Wood *v.* Morgan, 65.
Wood *v.* Orser, 8.
Wood *v.* R. Co., 104, 115, 307.
Woodeu *v.* Austin, 162.
Woodman *v.* Hubbard, 21.
Woodman *v.* Nottingham, 15.
Woodruff *v.* Halsey, 68.
Woodruff *v.* Painter, 332.
Woodruff *v.* Sherrard, 139, 149, 150.
Woodruff Sleeping Car Co. *v.* Diehl, 324, 325, 328.
Woods *v.* Devin, 270, 271, 272, 282.
Woods *v.* R. Co., 304.
Woodward *v.* Birch, 81.
Woodward *v.* Cutter, 9.
Woolen Manfg. Co. *v.* Huntley, 26.
Woolery *v.* R. Co., 266, 308.
Wooley *v.* Louisville Bank, 53.
Woolf *v.* Bernero, 33.
Woolsey *v.* R. Co., 225.
Wooster *v.* Tarr, 160, 213.
Word *v.* Morgan, 58.
Worth *v.* Edmonds, 120.
Worthen *v.* R. Co., 307.
Worthington *v.* Towney, 52.
Wright *v.* Caldwell, 116.
Wright *v.* Gaff, 137.
Wright *v.* Holbrook, 301.
Wright *v.* R. Co., 12, 204, 205, 224, 265, 294.
Wright *v.* Ross, 51, 52.
Wright *v.* Solomon, 54.
Wright *v.* Terry, 26.
Wright *v.* Wilcox, 297.
Wyatt *v.* R. Co., 308, 312.
Wyckoff *v.* Anthony, 53.
Wyckoff *v.* Ferry Co., 84, 112.
Wyckoff *v.* South. Hotel Co., 82.
Wyld *v.* Pickford, 136, 193.
Wylde *v.* R. Co., 307.
Wyman *v.* R. Co., 103, 241, 257.

Y.

Yale *v.* Oliver, 40.
Yate *v.* Willan, 142.
Yeoman *v.* Contra Costa Co., 225, 340.
Yerkes *v.* Keokuk &c. Co., 232, 340.
Yerkes *v.* Sabin, 112.
Yonge *v.* Pac. Mail Steam. Co., 346.
York Co. *v.* R. Co., 137, 157, 160, 162.
York &c. R. Co. *v.* Winans, 296.
Yorke *v.* Greenaugh, 76, 215.
Yorton *v.* R. Co., 244, 347.
Young *v.* Bruce, 13, 25.
Young *v.* Kimball, 212.
Young *v.* Kinney, 340.
Young *v.* R. Co., 291, 292.
Young *v.* Smith, 201.
Young *v.* Tel. Co., 318, 319, 320, 350.

Z.

Zagelmeyer *v.* R. Co., 258, 261.
Zeigler *v.* R. Co., 230.
Zemp *v.* R. Co., 304,, 306, 340.
Zenobia, The, 346.
Zerega *v.* Poppe, 337.
Zinn *v.* Steam. Co., 201.
Zone, The, 170.
Zung *v.* Houland, 174.
Zunz *v.* R. Co., 240.

INDEX.

The References are to Pages.

ACTION,
Right of, by bailee against person interfering with his possession, 34.
The pledgee's right of action, 114.
The pledgor's right of action, 115.
The carrier's right of action for his freight charges, 290.
The carrier's right of action for injury to goods in his hands, 290.
Action against carrier for loss or injury to goods, 288.
May be brought against telegraph company by sendee of telegram, 502.

ACT OF GOD,
What is, and what is not, 182-186.

ADVERTISEMENTS. See LIMITING LIABILITY.

AGISTER,
Liability of, 86, 87.

AGREEMENT. See CONSIDERATION: LIMITATION OF LIABILITY.
Bailee may by, extend his liability, 30.
Termination of bailment by, 60.

ASSAULT,
Liability of carrier for assault by third person made on passenger, 466.

BAGGAGE. See also CONTRIBUTORY NEGLIGENCE: SLEEPING CARS.
Liability of innkeeper for baggage of guest, 133.
Right of passenger to baggage, 388.
Carrier of baggage an insurer, 387.
What is baggage, 391.
Usage and custom relevant, 399.
Carrier may refuse to carry, when, 400.
Effect of failure to state kind, 400.
Effect of failure to state value, 401.
May enquire as to contents of trunk, 401.
Knowledge of carrier that articles are not baggage, 402.
Owner of baggage must be passenger, 404.
Need not accompany baggage, 404.

The References are to Pages:

BAGGAGE—*Continued.*

When liability of carrier begins, 405.
Before purchase of ticket, 406.
Baggage left without notice, 407.
Custom as to leaving baggage without notice, 407.
The baggageman and his powers, 408.
The baggage check, 409.
When liability of carrier ends, 410.
Liability of carrier as warehouseman, 412.
As to connecting carriers, 413.
Where baggage in custody of passenger, 414.

BAGGAGE CHECKS. See LIMITING LIABILITY.

BAILMENT,

Defined, 9.
Re-delivery of thing not essential to, 10.
Express agreement not essential, 10.
Involuntary deposits, 11.
Finder is a bailee, 11.
No bailment without consent of bailee, 12.
The different classes of bailments, 13.
The old divisions, 13.
The new divisions, 13.
Subject-matter of, a chattel, 17.
License to use realty not a, 17.
Lease of house or lodgings not a, 17.
Aliter as to storage warehouse, 18.
Distinction between sale and, 19, 20.
Chattel to be returned in altered form, 19.
Grain delivered to elevator, 19.
Deposit of money in bank not a, 20.
Nor loan of money, 20, 21.
Parties to contract of, 23.
Liability of bailee for acts of agents or servants, 23.
Consideration necessary to support bailment contract, when, 24.
Care and diligence required of bailees, 25, 30.
Modification of liability by agreement, 30, 33.
Modification of liability by acts or conduct of bailor, 33.
Bailee's special property in chattel bailed, 34.
Bailee's right of action against third parties interfering with chattel, 35.
Bailee's property limited to trust, 37.

The References are to Pages.

BAILMENT—*Continued.*
Cannot sell bailed chattel, 37.
Trust duties of bailee, 38.
May not dispute bailor's title, 38.
Exceptions, 38.
Must follow his instructions, 39.
Bailee may use chattel when, 42, 44.
Duty of bailee to re-deliver the chattel, 46.
No excuse that he delivered to wrong person by mistake, 47.
Excuses for non-delivery, 49.
Duties of bailor, 49.
Must allow bailee free use of thing, 50.
Must not loan or let a defective thing, 50.
Bailor not liable for bailee injuring third persons, 51.
Duty of bailor as to compensation and re-imbursement, 51.
The bailee's lien, 55, 59.
Joint and several bailees, 59.
Termination of bailment, 60.
By agreement of parties, 60.
By acts of parties, 60.
By expiration of time, 61.
By violation of duty, 61.
By incapacity of parties, 62.
By death, 62.
By bankruptcy, 62.
By destruction of chattel, 62.
By bailee becoming purchaser, 62.
By limitation, 62.
Gratuitous bailments for bailor's sole benefit, 64, 74.
Rights and liabilities in such bailments, 64, 74.
Gratuitous bailments for bailee's sole benefit, 75.
The gratuitous loan, 75, 78.

BANKRUPTCY,
Termination of bailment by, 62.

BANKS,
Deposit of money in, not a bailment, 20.
Except it be a special deposit, 20, 21.

BILLS OF LADING. See LIMITING LIABILITY.

BOARDING HOUSES.
Distinguished from inns, 126.

BURDEN OF PROOF. See EVIDENCE.

The References are to Pages.

CARE AND DILIGENCE. See also NEGLIGENCE.
The measure of, required of bailees, 13, 14, 24.

CARRIERS. See COMMON CARRIERS OF GOODS: COMMON CARRIERS OF PASSENGERS.
Liability of private carrier, 90, 91.

CHARGES. See COMPENSATION AND REIMBURSEMENT.

CHATTEL,
Subject-matter of bailment a, 17.

CHATTEL MORTGAGE,
Distinction between pledge and, 93, 94.

COMMODATUM,
What is, 13.

COMMON CARRIERS OF GOODS,
Definition of, 141.
Who are, 142, 145.
Who are not, 146.
Carriers of live animals as, 146.
Are subject to public regulation and control, 149, 150.

(a) *Duty to Receive.*
Must carry for all persons, 151.
Must carry for all under same conditions, 152.
Must carry for reasonable compensation, 152.
Right to discriminate in charges, 153.
Exceptions to rule that carrier must carry for all who apply, 156.
Where payment of charges refused, 156.
Where service outside his holding out, 156.
Where goods ill-conditioned or suspicious, 158.
Where he has insufficient room, 159.
Carriage must be for hire, 160.
Carriage beyond carrier's route, 160.
Has power, but not bound to carry beyond his route, 161, 163.
Effect of agreement not to carry beyond route, 163.
Proof of agreement to carry beyond route, 165.
Actual delivery to connecting carrier required, 167.
Except as between the carriers themselves, 168.
Receipt of goods marked to place beyond route, effect of, 169, 171.
Right of connecting carrier to exemptions in first contract, 172.

The References are to Pages.

COMMON CARRIERS OF GOODS—*Continued.*
Power of first carrier to contract with connecting carrier, 173.
Other rights and liabilities of connecting carriers, 174.
Presumption as to time of damage, 175.

(b) *Responsibility During Transit.*
Carrier's responsibility begins on delivery, 176.
Actual or constructive acceptance necessary, 178.
At what place must delivery be made, 178.
To whom must delivery be made, 178.
Delivery according to usage and custom, 179.
Common carrier a bailee for hire, 180.
Common carrier likewise an insurer, 180.
Exceptions to his liability as insurer, 181.
What is the "Act of God," 182, 186.
Cases not within the "Act of God," 186.
The question of negligence immaterial, 187.
"Act of God" must be exclusive cause, 187.
Negligence and "Act of God" concurring, 188.
Loss by "Act of God" after delay, 189.
Loss by "Act of God" after deviation, 190.
Duty of carrier to preserve goods damaged by "Act of God," 191.
The public enemy, 192.
Losses caused by inherent defects in goods carried, 193.
Losses caused by seizure under process, 194.
Losses caused by act or omission of owner, 196.
Losses caused through fraud of owner, 196.
Losses caused by neglect of owner, 198.
Owner undertaking part of carrier's duties, 198.

(c) *Modification of Liability by Agreement.* See LIMITING LIABILITY.
Effect of special contracts made with shipper, 242.

(d) *Duty to Redeliver.*
Carrier's responsibility continues until he makes delivery, 275.
Delivery must be at proper place, 276.
Delivery must be in reasonable manner, 278.
Delivery must be at proper time, 280.
Delivery must be within reasonable time, 281.
Where personal delivery required, 277.
Where notice of arrival must be given, 279.
Instructions of shipper must be followed, 282.
Liability for delivery to wrong person, 284.

The References are to Pages.

COMMON CARRIERS OF GOODS—*Continued.*
Duty of carrier to notify consignor, 284.
Right of consignee to examine goods, 285.
Claims of ownership of third persons, 285.
Who may sue for loss or injury to goods while in carrier's hands, 288.
Carrier may sue for interference with them by third persons, 290.
Right of action for freight charges, 290.
Power of carrier to sell goods for charges, 291.
The carrier's lien, 292.

COMMON CARRIERS OF PASSENGERS. See also BAGGAGE: CONTRIBUTORY NEGLIGENCE: SLEEPING CAR COMPANIES.

(a) *Relation of Carrier and Passenger.*
Who are, 298.
Must carry for all who apply, 299.
Where payment of fare refused, 300.
Where service demanded outside his holding out, 300.
Where he has insufficient room, 300.
Where person has conflicting interests, 301.
Where person dangerous or offensive, 301.
Waiver by receiving passenger, 302.
Who are passengers, 303.
Servants of carrier as passengers, 306.
At what time relation begins, 307.
During what time relation continues, 309.
At what time relation ends, 310.
Persons not passengers to whom carrier owes duty, 310.

(b) *Duty as to Means of Transportation.*
Carrier of passengers is not an insurer, 313.
Liable for slight negligence, 313.
Duty as to his vehicles and appliances for transportation, 314.
Duty as to his stations and landing places, 328.
Duty as to his roadway, 327.
Duty to adopt new inventions for safety, 330.
Responsibility for negligence of contractor or manufacturer, 330.

(c) *Duties and Liabilities during Transit.*
Carrier must furnish passenger with seat, 358.
And means of refreshment, 360.
Must carry passenger to destination, 360.

The References are to Pages.

COMMON CARRIERS OF PASSENGERS—*Continued.*
Must enable him to land safely, 361.
Powers of carrier to establish regulations, 364.
Passenger may be ejected for violation of regulations, 365.
Mode and place of ejection, 367.
Passenger's right to resist ejectment, 367.
No right to imprison, 369.
Non-payment of fare; right to eject for, 372.
Requiring previous purchase of tickets, 373.
Showing and surrendering ticket, 374.
Other regulations as to tickets, 376.
Concerning use of carrier's premises, 377.
Classification of passengers, 376.
Right to discriminate on account of color or sex, 377.
Passengers on freight trains, 378.
Dangerous and disorderly passengers, 381.
Notice of regulations, when necessary, 382.
Persons under physical or mental disability, 383.
(c) *Contract of Carriage.*
Time tables as contracts, 332.
Liability of carrier for not running according to time table, 337.
Tickets as contracts, 338.
Conditions printed on tickets, validity of, 338.
Assignability of ticket, 345.
Conclusiveness of ticket as between passenger and carrier's agents and servants, 345.
Limiting liability for negligence—See LIMITING LIABILITY.
Duty of carriers toward passengers riding free, 348.
Who are free passengers, 349.
Special contracts with passengers, 357.
(d) *Acts of Third Persons.*
Passenger carrier not bound to carry beyond route, 420.
Liability where he makes through contract, 421.
Evidence of through contract, 422.
Where means of transportation belong to third parties, 423.
Where third parties use carrier's means of transportation, 427.
Where line in hands of trustees, 428.
Where line in hands of lessees, purchasers or others, 430.
Liability of master for acts of servants, 435.
Application of foregoing rules as between carrier and passenger, 440.

The References are to Pages.

COMMON CARRIERS OF PASSENGERS—*Continued.*
Rule of absolute liability and reasons therefor, 451.
Relation of master and servant must exist, 453.
Liability for acts of independent contractors, 455.
Liability for acts of fellow-passengers and strangers, 466.

COMPENSATION AND REIMBURSEMENT. See also ACTION.
Compensation of bailee for hire, 51.
Effect of destruction of chattel upon, 52, 54.
In hiring of chattels, 52.
Common carrier obliged to carry for reasonable compensation, 152.

CONNECTING CARRIERS,
Liability of carrier for default by, 160, 175.

CONSENT,
Essential to bailment contract, 12.

CONSIDERATION,
When essential to bailment contract, 24, 82.
Must be absent in gratuitous bailments, 65, 66.
In case of gratuitous loan, 75, 76.
Required to support contract of carrier limiting his liability, 234.

CONSTRUCTION. See WORDS, PHRASES AND DEFINITIONS.
Of contracts of carriage, 242.

CONTRIBUTORY NEGLIGENCE,
Of bailor toward chattel, 33.
In selection of bailee, 33.
Of guest at inn, 133.
Of owner of goods in hands of carrier, 134.
Of passenger in alighting from train, 363.
Carrier not liable where passenger injures himself, 474.
Where both carrier and passenger are negligent, 475.
Negligence a question of fact—province of judge and jury, 477.
Contributory negligence—riding in dangerous place, 477.
Riding in dangerous manner, 478.
Boarding or leaving vehicle, 480.
Other cases of contributory negligence, 486.
Caused by carrier's fault, 483.
Loss of baggage, 486.
Passenger in sleeping car, 487.
Acts of passenger resulting from directions of carrier's servants, 487.

The References are to Pages.

CONTRIBUTORY NEGLIGENCE—*Continued.*
Of third persons, 488.
Of persons in charge of children, 489.
Of carrier of passenger, 491.
Of sender of telegraphic dispatch, 514.

COSTS. See COMPENSATION AND REIMBURSEMENT.

DAMAGES,
Measure of damages in actions against ordinary bailees, 572.
Common carriers of goods, 574.
Carriers of passengers for breach of contract, 576.
In actions of tort, 578.
Exemplary and punitive damages, 582.
Measure of damages in actions against telegraph companies, 584.
Damage for mental suffering recoverable in Texas and other States, 595.
The Texas doctrine denied in some States, 602.
Arguments for and against the Texas doctrine, 602.

DEATH,
Termination of bailment by, 62.

DEFINITIONS. See WORDS, PHRASES AND DEFINITIONS.

DELAY,
Of carrier in delivering goods, 281.
Effect of loss by act of God after, 189.

DELIVERY,
Of possession of pledged thing essential, 94.
Aliter in case of chattel mortgage, 94.
Delivery of incorporeal property in pledge, how made, 95.
Constructive delivery, how made, 96.

DEPOSIT,
Involuntary, what is, 11.
Necessary, what is, 11.

DEPOSITUM,
What is, 13, 14.

DEVIATION,
Effect of loss by act of God, after, 190.

DURESS. See LIMITING LIABILITY.

ELEVATORS. See PASSENGER ELEVATORS; BAILMENTS.

The References are to Pages.

EVIDENCE,
Burden of proof in ordinary bailments, 543.
In actions against inn-keepers, 548.
In actions against common carriers of goods, 548.
Proof of the contract, 549.
Quantum of proof required, 549.
Proof that loss within excepted causes, 550.
Burden of proof as to negligence, 551.
Burden of proof under special circumstances, 553.
Burden of proof in actions against carriers of passengers, 554.
Burden of proof of contributory negligence, 563.
Burden of proof in actions against telegraph companies, 569.
Burden of proof in actions against sleeping car companies, 570.

EXPRESS RECEIPTS. See LIMITING LIABILITY.

FACTOR,
Is a bailee, 5 n.
Has title against everyone but owner, 35.

FINDER,
As a bailee, 11.

FRAUD. See LIMITING LIABILITY.
In obtaining loan, effect of, 12.
Pledge obtained by, gives no rights, 12.
Of owner of goods in hands of carrier, effect of, 196.

FREIGHT TRAINS,
Rights of persons upon, 378.

GRATUITOUS BAILMENTS,
Are the *depositum* and *mandatum* of the civil law. 64.
Consideration must be absolutely absent, 65.
Any indirect benefit sufficient, 66.
Liability of gratuitous bailees, 68, 72.
Rule where bailee has requested the bailment, 72.
Skilled gratuitous bailees, liability of, 73.
The gratuitous loan is the commodatum of the civil law, 75.
To make loan gratuitous, benefit must be all on borrower's side, 75, 76.
Liability of borrower, 76, 78.

HIRE OF CHATTELS,
Hirer must use them in way contemplated by contract of hire, 44, 46.
Otherwise he becomes an insurer, 44.
Distinguished from loan by consideration, 82.
Rights of hirer, 82.
Responsibility of hirer, 83.

The References are to Pages.

HIRE OF SERVICES,
Liability of bailee for neglect, 83, 85.

IMPRISONMENT,
Carrier has no right to imprison passenger for non-payment of fare, 367.

INCREASE,
Right to increase of pledged chattel, 100.

INFANTS,
Duties of carrier towards, 383.

INNKEEPERS,
Who are innkeepers, 125.
Distinguished from boarding house and lodging house keepers, 126.
Duty to receive the public, 127.
Duty only toward guests, 128.
Duty as to guest's person, 129.
An insurer of guest's property, 130.
At what time liability begins, 132.
At what time liability ends, 132.
For what property responsible, 133.
Contributory negligence of guest, 134.
Limitation of innkeeper's liability, 135.
The innkeeper's lien, 137.
Sleeping car companies as, 518, 529.

INSANITY,
Termination of bailment by, 62.

JOINT AND SEVERAL LIABILITIES,
Joint and several bailees, 59.

LEASE,
Of house or lodgings not a bailment, 17.
Liability of carrier when road in hands of lessee.

LICENSE,
To use realty not a bailment, 17.

LIEN,
Of bailee of chattel for services, 55.
Requisites to lean of ordinary bailee, 56, 59.
Is defeated how, 57.
Of innkeepers, 137.
Of common carriers, 292.

The References are to Pages.

LIMITATION,
When statute runs against bailor's right, 62.
Extinguishment of pledge by, 118.
Of time for making claim against carrier, 236.

LIMITING LIABILITY,
Bailee may limit his liability, 32.
May stipulate for exemption from his neglect, 32.
Of innkeeper by contract and statute, 135.
Power of common carrier to limit his liability.—In England, 203.
In the United States, 204.
Reasons for the American rule, 208.
Anomalous doctrines in New York, Illinois and Pennsylvania, 211.
Notices limiting the carrier's liability, 216.
Distinctions between notices limiting liability and notices of reasonable regulations, 216.
Notices as to value and character of goods, 217.
Methods of giving notice.—Advertisements and placards, 221.
Notices in receipts or other vouchers, 222.
Notice assented to constitutes a contract, 223.
Assent not inferred from mere knowledge, 224.
Accepting papers containing limitations or conditions, 225.
Notices in bills of lading, 225.
Notices in express receipts, 226.
Notices in baggage checks, 227.
Requisites to validity of notices limiting liability, 228.
There must be no mistake, 228.
Nor duress, 229.
Nor fraud, 230.
Nor waiver, 232.
Nor antecedent parol contract, 233.
Must have a consideration, 234.
Conditions as to time and manner of making claim, 236.
Other conditions sustained as reasonable, 239.
Bills of lading as receipts and contracts, 240.
Effect of the special contract, 242.
Contracts construed strictly against carrier, 243.
Construction of conditions and exceptions in carrier's contracts. See WORDS, PHRASES AND DEFINITIONS.
Limiting liability for negligence as to paying passengers, 348.
Duty of carrier towards free or paying passenger the same, 348.
Who are free passengers, 349.
Limiting liability for negligence—as to free passengers, 351.

The References are to Pages.

LIMITING LIABILITY—*Continued.*
Arguments in support of the different views, 357.
Special contracts with passengers, 357.
Limitation of liability in blanks of telegraph company, 503, 505.

LIVERYMAN,
Liable for negligently furnishing unsuitable horse, 50.
But does not warrant horse free from defects, 50.
Liability of, in general, 87.

LOAN. See also GRATUITOUS BAILMENTS.
Of money not a bailment, 21.
Valued loan, what is, 22.
Lender must not lend defective chattel, 50.

LOCATIO. See also HIRE OF SERVICES: HIRE OF CHATTELS.
What is, 13.

LODGING HOUSES,
Distinguished from inns, 126.

LOSS,
Extinguishment of pledge by, 117.

MAIL CARRIERS,
Liability of, for loss of letters, 535, 540.

MANDATUM,
What is, 13, 64.

MANUFACTURER,
Materials during process of manufacture belong to, 21.
Do not vest in party for whom made until completed, 21.

MARRIAGE,
Termination of bailment by, 62.

MASTER AND SERVANT,
Liability of bailee for acts of servants or agents, 23.
Bailor not liable for acts of bailee, 51.
Servants of carrier as passengers, 303.
Responsibility of carrier of passengers for neglect of manufacturer or contractor, 330, 455.
Liability of carrier of passengers for acts of servants and agents, 435, 453.

MEASURE OF DAMAGES. See DAMAGES.

MERGER,
Extinguishment of pledge by, 118.

MISTAKE. See LIMITING LIABILITY: REDELIVERY.

The References are to Pages.

MUTUAL BENEFIT BAILMENTS. See also HIRE OF CHATTELS: HIRE OF SERVICES: CARRIERS.
The classes of, 79, 80.
The standards of care and responsibility, 80, 82.

MUTUUM,
What is a, 21.

NEGLIGENCE. See COMMON CARRIERS OF GOODS: BURDEN OF PROOF: EVIDENCE.
Defined, 26.
Is absence of care according to the circumstances, viz., 26.
Nature and value of article, 26.
Customs of place or trade, 26.
Condition of country and climate, 26.
Condition of time, 26.
Negligence immaterial where bailment is tortious, 36.
Or where bailee has converted the property, 37, 46.
Or where bailee violates his instructions or breaks bailment contract, 39, 41, 42, 44.
Liability of gratuitous bailees for, 68, 72.
Liability of borrower for, 75, 78.
Liability of mutual benefit bailees, 80, 82.
Liability of hirer, 83.
Liability of one whose services are hired, 83, 85.
Liability of pledgee in keeping pledged thing, 103.
Liability of inn-keeper for, 129.
Liability of carrier of passengers for, 313.
Liability of owner of passenger elevator for, 533, 535.
Liability of telegraph company for, 501.
Liability of telephone company for, 515.
Liability of sleeping car company for, 529.
Liability of postmasters for, 535.

NEGROES,
Right of on vehicles of carrier, 377.

NOTICE. See COMMON CARRIERS OF GOODS.

NOTICES. See LIMITING LIABILITY.

PASSENGER ELEVATORS,
Liability of owners of, for injuries to persons using them, 533, 535.

PASSENGERS. See COMMON CARRIERS OF PASSENGERS.

PAWN. See PLEDGE.

The References are to Pages.

PAYMENT,
Extinguishment of pledge by, 116.

PIGNUS,
What is, 13.

PLACARDS. See LIMITING LIABILITY.

PLACE,
At what place may chattel be demanded, 47.
Of delivery to common carrier, 178.

PLEDGE,
Pledge defined, 93.
Distinction between pledge and chattel mortgage, 94.
What things may be pledged, 97.
The pledged thing is security for what debts, 98.
The pledgor's title, 99.
The debt or engagement, 100
The increase and profits, 100.
The pledgee's right of transfer, 101.
The pledgee's duties in regard to the pledge, 103.
The pledge an additional remedy; pledgee may still sue for debt, 104.
The right to redeem, 105.
The pledgee's duty to re-deliver, 105.
The pledgee's right to sell on default, 107, 110.
Pledgee cannot purchase, 110.
Irregular sale may be ratified, 110.
Power to sell not mandatary, 111.
Pledgee not liable for consequences of sale, when, 112.
The pledgor's right to the surplus, 113.
The pledgee's right of action, 114.
The pledgor's right of action, 115.
The pledge, how extinguished, 116, 119.
By payment, 116.
By death of either party, 119.
By release or waiver, 116.
By loss or destruction, 117.
By surrender, 117.
By limitation, 118.
By merger, 118.

POSTMASTERS,
Liability of for loss of letters, 535, 540.

PRESUMPTION. See also EVIDENCE.
As to time of loss of, or damage to goods in hands of carrier, 175.

The References are to Pages.

PROCESS,
Effect of seizure of goods in carrier's hands, 194.

PUBLIC OFFICER,
Bailee of property in his hands, 12.

RECEIPTS. See LIMITING LIABILITY.

RECEIVER,
Liability of carrier where road in hands of, 428.

RE-DELIVERY. See also COMMON CARRIERS OF GOODS.
Duty of bailee to re-deliver chattel, 46.
Delivery to wrong person by mistake, 47.
At what place may property be demanded, 47, 48.
At what time may property be demanded, 48.
Excuses for non-delivery, 49.
Delivery to real owner, 49.
That chattel has been destroyed or lost, 50.
The pledgee's duty to re-deliver the pledge, 105.

RELEASE,
Extinguishment of pledge by, 116.

REPAIRS,
Person doing, on chattel a bailee, 22.
Materials added by workman, become property of owner of chattel, 22.

SALE,
Distinction between sale and bailment, 19.
Where goods are sold conditionally, 20.
Right of pledgee to sell pledge on default, 107, 110.
By bailee of bailed chattel gives no title, 57.
Power of sale for carrier's charges, 291.

SEQUESTRATION,
What is, 12.

SLEEPING CAR COMPANIES,
General rights and duties of, 516.
Not common carriers, 516.
Not liable as inn-keepers, 518.
Contrary view—sleeping car company liable as an inn-keeper, 519.
This view sustained in Nebraska, 522.
The liability of the sleeping car company, 529.

STOPPAGE IN TRANSITU,
Right of shipper to, 287.

SURRENDER,
Extinguishment of pledge by, 117.

The References are to Pages.

TELEGRAPHS,
Duties and obligations of telegraph companies, 495.
Telegraph company not an insurer, 497.
Liability of telegraph company for errors in transmission, 501.
Action may be brought by addressee, 502.
Limitation of liability by contract, 503.
Conditions contained in telegraph blanks, 505.
Connecting lines, liability for acts of, 513.
Contributory negligence of sender, 514.

TELEPHONES,
Rights and liabilities of telephone companies, 515.

TICKETS. See COMMON CARRIERS OF PASSENGERS.

TERMINATION,
Bailment terminated in what ways, 60, 62.

TIME,
At what time may property be demanded, 48.
At what time is bailment terminated, 60, 61.
Of delivery by common carrier, 276, 280.

TIME TABLES,
As contracts, 332.

TITLE. See SALE.
Bailee may not dispute bailor's title, 38.
Exception, 38.
Distinction between pledge and chattel mortgage as to, 93, 94.
Title of pledgor of chattels, 99.
Right of pledgee to transfer pledge, 101.

TRUSTEE,
Liability of carrier where road in hands of, 428.

USAGES AND CUSTOMS,
Of place or trade, relevant on question of care, 26, 27, 28.

USE,
When bailee may and may not use bailed chattel, 42, 44.

VADIUM,
What is, 13.

VALUE,
Of chattel, relevant on question of care, 26.

WAIVER. See COMMON CARRIERS OF PASSENGERS: LIMITING LIABILITY.
Extinguishment of pledge by, 116.

The References are to Pages.

WAREHOUSEMAN,
Rent of quarters in storage warehouse, when a bailment, 18.
Liability of, for neglect, 87.

WARRANTY,
Promise to return chattel in "good order," not a warranty, 30.

WHARFINGER,
Liability of, 90.

WORDS, PHRASES AND DEFINITIONS.
Act of God, 182.
All rail, 268.
Article, 268.
Bailment, 9.
Bill of lading, 240.
Call at ports, 250.
C. O. D., 269.
Common carrier, 141, 298.
Damage, 250.
Dangers of the roads, 251.
Dangers of the seas and perils of navigation, 251.
Deficiency in quantity, 259.
Depot, 269.
Extraordinary marine risk, 260.
Fire, 260.
Feed, water and take proper care, 270.
Fire, 270.
Free passenger, 349.
Good order and condition, 260.
Guest, 128.
Household goods, 270.
Invoice value, 262.
Involuntary deposit, 11.
Innkeeper, 125.
Leakage and breakage, 262.
Lien, 55.
Load and unload, 270.
Loss, 271.
Necessary deposit, 11.
Negligence, 26.
On Lakes and Rivers, 263.
On the train, 271.
Package or thing, 271.
Passenger, 303.

The References are to Pages.

WORDS, PHRASES AND DEFINITIONS—*Continued.*
Perishable property, 272.
Pilot, master or mariners, 263.
Place of destination, 272.
Pledge, 92.
Port of discharge, 263.
Privilege of re-shipping, 263.
Public enemy, 192.
Quantity guaranteed, 264.
Ready to discharge, 265.
Restraints of princes, 266.
Robbers and thieves, 266.
Tow and assist vessels, 267.
Through without transfer, 273.
Transit, 273.
Unavoidable or inevitable accident, 273.
Value or cost, 274.
Value and contents unknown, 267.

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